Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1999

BASSAM HINDI; et al.,
Petitioners,
vs.
TOSCO CORPORATION; et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals err by allowing a mere holder of an "option to purchase" petroleum franchises to offer the existing dealer a 'non-discriminatory' franchise? The decision of the Ninth Circuit Court of Appeal is in conflict with all other Courts of Appeal.

2. Did the Ninth Circuit Court of Appeals judicially alter the statutory provisions of the PMPA and engage in unconstitutional judicial legislation when it concluded that the holder of a mere "option to purchase" was the same as a statutorily required "purchaser" of a petroleum franchise?

LIST OF PARTIES

Petitioners: BASSAM D. HINDI; BEHROUZ SHIRDEL; MOHAMAD SHIRDEL; CARPINTERIA CAR CARE, INC.; CHI TAI; COUNTRY CLUB UNION, INC.; DANIEL LEE O'NEAL; DANIEL W. LENTZ; FAYE FOUAD; RAY FOUAD; FRANK E. JAKEL; GREGORY MESNA; GWENDOLYN MESNA; HARRY PERRY; HAYK BAZIK; HOVICK G. SADEGHI; JAVAD HAGHI; JOHN HIFAI; JOHN OTTE; MAURO ANTENNCEI; ONNIK NICK MATHEVOSSIAN; PAUL A. HILLES; PATRICIA A. HILLES; RANDALL LEE EMRY; SAEID-H-SABOUR; SAID SAIDATI; SALIM JAVAHIERI; TOMMY GENDAL; TRACY FINNEL; VAN DUONG; BRADLEY DeBOER; and DENNIS AZZARELLO.

Respondents: TOSCO CORPORATION, a Nevada corporation, T NORTHWEST PROPERTIES, II, INC., an Arizona corporation, CLOVER TRUST 1997-1, a Delaware Business Trust, and UNION OIL COMPANY OF CALIFORNIA, a California corporation.

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Petitioners, Bassam D. Hindi, Behrouz Shirdel, Mohammad Shirdel, Carpinteria Car Care, Inc., Chi Tai, Country Club Union, Inc., Daniel Lee O'Neal, Daniel W. Lentz, Faye Fouad, Ray Fouad, Frank E. Jakel, Gregory Mensa, Gwendolyn Mensa, Harry Perry, Hayk Bazik, Hovick G. Sadeghi, Javad Haghi, John Hifai, John Otte, Mauro Amtenncei, Onnik Nick Mathevossian, Paul A. Hilles, Patricia A. Hilles, Randall Lee Emry, Saeid-H-Sabour, Said Saidati, Salim Javahieri, Tommy Gendal, Tracy Finnel, Van Duong, Bradley DeBoer, and Dennis Azzarello, respectfully petition this court for Issuance of its Writ of Certiarari.

INTRODUCTION

This action involves the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. (The "PMPA"). The PMPA was enacted June 19, 1978, to establish "minimum Federal Standards governing the termination and non-renewal of franchise relationships for the sale of motor fuel by the franchiser or supplier of fuel." S.Rep. No. 731, 95th Congress, 2nd Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 873. Congress was concerned "with the disparity of bargaining power between distributors and retailers of motor fuel. With this remedial purpose in mind, Congress sought to limit the circumstances in which a distributor could terminate a franchise relationship with the retailer." *Bsales v. Texaco, Inc.* 516 Fed.Sup. 655, 661 (D.N.J. 1981).

This action arises out of events which occurred in 1997 as a consequence of which Petitioners asserted that they should have been granted a statutorily provided right of first refusal to purchase their service station premises.

This petition for Writ of Certiorari is required as a consequence of the Ninth Circuit Court of Appeals' affirmation of a district court judgment that the PMPA does not preclude the transferee of a franchiser's interest in service stations from financing the purchase and using the premises as security, despite the PMPA's requirement that the "purchaser" offer the existing franchisee a right of first refusal. This decision which stands in conflict to that of other circuit courts of appeal and resulted in unconstitutional judicial legislation was contrary to existing law and has resulted in substantial injustice to Petitioners who have vigorously litigated to enforce the federal statutes enacted for their protection.

OPINIONS BELOW

The following orders or opinions are reproduced in the Appendix to this brief:

1. The order of the Unites States District Court, Central District of California, granting summary judgment in favor of Respondents in June, 1998.

2. The opinion of the United States Ninth Circuit Court of Appeals affirming the district court filed May 18, 1999.

3. The order of the United States Ninth Circuit Court of Appeals denying petition for rehearing, entered June 14, 1999.

JURISDICTION

Jurisdiction for review of the issues outlined in the introduction to this brief exists pursuant to Unites States Supreme Court Rules, Rule 10(a) and 10(c).

The statutory provision which confers jurisdiction on this Court is the Petroleum Marketing Practices Act, 15, U.S.C. § 2801-2806 ("PMPA").

STATEMENT OF THE CASE

A. Factual Summary.

This action was brought on behalf of 35 Unocal Branded Petroleum Franchisees (hereafter the "Dealers"), for the violation of their rights under the Petroleum Marketing Practices Act, 15, U.S.C. Section 2801, et seq. ("PMPA") or, alternatively, for violation of their rights under California Business and Professions Code Section 20999 et seq.

Prior to December, 1996, each Dealer was a Unocal PMPA franchisee as that term is defined in 15 U.S.C.

§ 2802. On or about December 14, 1996, Unocal entered into an agreement with Tosco pursuant to which Unocal agreed to sell, transfer and assign to Tosco service station properties. Service station premises occupied by a petroleum franchisee are referred to as "leased marketing premises." 15 U.S.C. § 2801(8-9).

The Purchase and Sale Agreement between Tosco and Unocal, recited that Seller (Unocal) had made a determination "in good faith and in the ordinary course of business, to withdraw from marketing motor fuel through retail outlets in the States of California, Washington, Oregon, Nevada, Arizona, Alaska, and Hawaii ('withdrawal area') in accordance with the requirements of the PMPA."

Pursuant to the provisions of the Purchase and Sale Agreement, Tosco agreed that it would:

> *"In accordance with the provisions of PMPA, 15 U.S.C. § 2802(b)(2)(E)(iii)(II),* offer, in good faith, to each franchisee leasing a retail outlet from Seller a Franchise Agreement of at least three years' duration . . . ."

This provision was inserted in an effort to comply with the governing provisions of the PMPA. Under the terms and provisions of the PMPA, a petroleum franchisor may withdraw from a marketing area, and terminate a franchise, without affording to the petroleum franchisee a right to purchase the service station premises, ***only*** if the buyer is a person who "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee . . . ." (15 U.S.C. § 2802(b)(2)(E)(iii)(II)). If the party to whom the property is sold, transferred or assigned is not a franchisor, the franchisee is entitled to purchase the service station premises. (15 U.S.C. § 2802(b)(2)(E)(iii)(I)). This right if afforded to the franchisee to permit the franchisee to protect

the business and good will that he/she has diligently endeavored to establish over the course of many years and thousands of hours of work.

On December 26, 1996, Unocal caused to be sent to each Dealer a Notice of Termination of Petroleum Franchise. In this Notice, Unocal informed each Dealer that Unocal had determined to withdraw from marketing of gasoline in California, to sell the Leased Marketing Premises occupied by the Dealers to Tosco, to terminate the Dealers' petroleum franchises effective June 30, 1997, and that Tosco would offer to each Dealer a new Franchise Agreement.

On March 31, 1997, Tosco and Unocal amended the Sale and Purchase Agreement of December 14, 1996. As a result of Amendment No. 1, Unocal agreed to, and did, sell marketable fee title interest in slightly in excess of 300 service stations to Clover Trust 1997-1, a Delaware Business Trust. Dealers' properties were included in those sold to Clover Trust 1997-1. Concurrent with this sale, the franchise of each Dealer was assigned to Tosco and Tosco agreed to assume and discharge all of Unocal's obligations under the existing Franchise Agreements with each Dealer. Each of the properties occupied by the Dealers in this action were included among those that were sold, transferred and assigned by Unocal to Clover Trust.

In responsive pleadings, Unocal, Tosco, T Northwest Properties, and Clover Trust have all admitted that the properties occupied by Dealers were sold, transferred and assigned by Unocal to Clover Trust, and not to Tosco.

Clover Trust leased the properties to T Northwest Properties, a subsidiary of Tosco, utilizing the classic provisions of a Triple-Net Lease. The lease between Clover Trust and Tosco further required that Tosco reserve, in all lease agreements between it and the Dealers, the "right under the PMPA to effect a termination" of the lease with the Dealers

if the lease between Clover Trust and Tosco was terminated or not renewed. Consistent with this obligation, the lease between Tosco and each Dealer contained the following:

"1. DEALER's Lease from TOSCO hereunder is SUBJECT TO and SUBORDINATE TO the CLOVER Lease and the Deed of Trust.

2. TOSCO hereby reserves all rights under the PMPA to effect a termination of this Lease upon any termination or expiration of the CLOVER Lease.

3. CLOVER shall have the right to effect a termination of this Lease upon any termination of the CLOVER Lease."

Thus, Tosco, in each of the Agreements executed with each Dealer, disclosed and admitted that it was not the purchaser and would not be the owner of the property and that any Franchise Agreement entered into between Tosco and each Dealer was expressly subject to, and might be terminated in the event of, expiration or termination of the underlying Lease Agreement between T Northwest Properties and Clover Trust.

Tosco asserted that notwithstanding that it is not the holder of title to the property it was the beneficial owner of the property. Discovery conducted of Clover Trust confirmed that Tosco is not the beneficial owner of the property, but that Clover Trust holds title to the property for the benefit of Sanwa Business Credit Corp.

B. Procedural Summary.

On August 26, 1997, pursuant to 28 U.S.C. § 1332, Petitioners, filed a Complaint against Unocal, Tosco and Clover Trust, in the Central District Court of California for violations of the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 et seq. and other pendant state claims. The Complaint sought to establish the Dealers' right

to receive a right of first refusal to purchase their service station properties occupied by them as provided by the PMPA. Each Respondent filed an Answer to the Complaint.

On May 18, 1998 the Dealers filed a Motion for Summary Adjudication of the Fifth Cause of Action for Unocal's failure to grant Petitioners' rights to purchase their business properties prior to the sale to Clover Trust 1997-1. Opposition and Reply briefs were filed by the parties.

On June 8, 1998 Tosco filed a Motion for Summary Judgment which was opposed by Petitioners.

On June 15, 1998 the Dealers also filed a Motion for Summary Adjudication of the Fourth Cause of Action of their Complaint to establish Petitioners' rights to purchase the "lease marketing premises" upon which their service station businesses were located. The motion was opposed by Respondents.

Hearing was conducted on all motions. The District Court granted Respondent's Motion for Summary Judgment. On June 29, 1998, Judgment was entered on the Order Granting Summary Judgment in favor of Respondents and against the Dealers.

On July 22, 1998, the Dealers timely filed a Notice of Appeal with the Ninth Circuit Court of Appeals. Petitioner argued that the District Court committed reversible error when it concluded that Tosco should be treated as though it were the owner of the properties, after their sale and transfer to Clover Trust. From this the District Court concluded that Unocal had properly withdrawn under the PMPA and that Tosco, who the trial court would deem to be the purchaser, had offered a replacement franchise. Accordingly, the District Court concluded the Dealers were not entitled to a right of first refusal to the premises occupied by them. The error of the Ninth Circuit Court was that Tosco was neither

the actual, legal, nor beneficial owner and purchaser of the premises.

On April 14, 1999, oral argument was heard by the Ninth Circuit Court of Appeals. On May 18, 1999, the Ninth Circuit issued its Opinion.

A Petition for Rehearing was filed by the Petitioners with the Ninth Circuit Court of Appeals on June 1, 1999. An Order denying rehearing was entered on June 14, 1999.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. The Ninth Circuit Court of Appeals erred by allowing a mere holder of an "option to purchase" of petroleum franchises to offer the existing dealer a 'non-discriminatory' franchise. The decision is in conflict with all other Courts Of Appeal.

The PMPA is federal legislation designed to protect petroleum franchisees. The underlying purpose for the enactment of the PMPA was "to provide for the protection of franchised distributors and retailers of motor fuel...and to prevent deterioration of competition in gasoline marketing," and "the establishment of minimal Federal standards governing the termination and non-renewal of franchise relationships." S.REP. No. 732, 95th Cong., 2d Sess. 1, 14 (1978).

The PMPA is the product of ten years of hearings and legislative proposals. There have been numerous Congressional reports on the PMPA, each of which expressed Congress' concern for protecting franchisees. S.REP. No. 1071, 93d Cong., 2d Sess. 2 (1973) (concern that independent branded fuel dealers were being treated inequitably by their oil company suppliers); H.R.REP. No. 1615, 94th Cong., 2d Sess. 1 (1976) (to provide for the protection of franchised distributors and retailers of motor fuel, to prevent deterioration of competition in gasoline retailing);

H.R.REP. No. 161, 95th Cong., 1st Sess. (1977) (to protect franchised distributors and retailers of motor fuel and to prevent deterioration of competition in gasoline marketing).

Central to the problems faced by franchisees is the disparity of bargaining power which exists between the franchisor and the franchisee. This disparity results in franchise agreements which may amount to contracts of adhesion. "The disparity of bargaining power which disadvantages the franchisee in negotiations...manifests itself in the contractually provided remedies....Commonly, the franchisor is able to capitalize on his disparity of bargaining power to obtain great flexibility with respect to his rights to terminate the contractual relationship." Termination of the franchise is an extreme and fundamentally punitive remedy which frustrates the parties' reasonable expectations that a franchise relationship will be a continuing one. Congress did note however that termination may be appropriate where contract violations "undermine the entire relationship." See, H.R.REP. No. 161, 95th Cong., 1st Sess. 14-15 (1977).

Moreover, Congress intended that real property lease agreements were to be incorporated in the Act's definition of franchise so that "the [A]ct's substantive provisions...may not be circumvented by termination or non-renewal of the real estate lease...which thereby renders the trademark license valueless. H.R.REP. No. 161, 95th Cong., 2d Sess. 20 (1974). The purpose of Congress' broad interpretation of what constitutes a franchise is to prevent circumvention of the Act's goal of franchise protection. See, S.REP. No. 731, 95th Cong., 2d Sess. 29 (1979). "As remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees." *Humboldt Oil Co. v. Exxon Co., U.S.A.*, 695 F.2d 386, 389 (9th Cir.1982); *Hilo v. Exxon Corporation*, 997 F.2d 641, 644 (9th Cir. 1993).

As remedial legislation, broad open constructions of the statute are to be avoided and the Act is to be given liberal

construction in furtherance of its objective to protect franchisees. *Brach v. Amoco Oil Co.* 677 F.2d 1213, 1220-1221 (7th Cir. 1982).

In DuFresne's Auto Service, Inc. v. Shell Oil Company, 992 F.2d 920, 925 (9th Cir. 1993), the Court of Appeal stated:

> "The PMPA is intended to protect gas station franchise owners from arbitrary termination or non-renewal of their franchises with large oil corporations and gasoline distributors, and to remedy the disparity in bargaining power between parties to gasoline franchise contracts. (Citations).
>
> "The cornerstone of the PMPA is 15 U.S.C. § 2802, which precludes franchisors from terminating any franchise or failing to renew any franchise relationship unless notification requirements are met *and the termination or non-renewal is based on specified grounds.*"

On December 26, 1996, Unocal sent to each Dealer written notice of intent to terminate the franchise with each Dealer and sell to Tosco based upon its determination to withdraw from the marketing of motor fuel in California. The termination of a petroleum franchise on the grounds of market withdrawal is governed by 15 U.S.C. § 2802b(2)(E). In the case of leased marketing premises, one of two alternative requirements must be met, dependent upon who purchases the property. If the purchaser of the property is a party who, like Clover Trust, will not be a franchisor, then the terminating franchisor (Unocal) must make "a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises, or, if applicable, offer the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises. . . ."

15 U.S.C. § 2802(b)(2)(E)(iii)(I). 15 U.S.C. § 2802(b)(2)(E)(iii)(II) provides:

> "(II) In the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more of the marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person. . . ."

This alternative requirement has been discussed by many courts. In *Boyers v. Texaco Refining and Marketing, Inc. and Mobil Oil Corp.*, 848 F.2d 809 (9th Cir. 1988), the 7th Circuit Court of Appeal stated: "Under this section, once Texaco decided to withdraw from the market, it was required either to offer to sell its interest to the franchisee (or offer the franchisee a right of first refusal), or Texaco could sell its interest to another person who would offer a franchise to the franchisee on a nondiscriminatory basis. 15 U.S.C. §§ 2802(b)(2)(E)(iii)(I) and (II). Texaco chose to sell its interest to Mobil who offered Boyers a new lease." Likewise in *Ewing v. Amoco Oil Co,* 823 F.2d 1432 (10th Cir. 1987), the 10th Circuit Court of Appeal noted that when franchisor seeks to terminate a franchise in the market withdrawal context:

> "In the case of leased service stations such as Ewing's, one of three things must occur for the withdrawing franchisor to comply with this section: (1) the franchisor offer to sell the premises to the franchisee; (2) the franchisor grants the franchisee a right of first refusal in the sale of the premises to another; or (3) if the franchisor sells the station to another, such other person offers, in good faith, a franchise to the fran-

chisee on terms and conditions which are not discriminatory to the franchisee. . . ."

* * *

The market withdrawal provisions of the statute support this interpretation. The selling franchisor must (1) offer to sell the station to the franchisee, (2) grant the franchisee a right of first refusal, or (3) ensure that ***a third-party purchaser*** offers the franchisee a nondiscriminatory franchise in good faith. ***We believe that the first two options evince Congress' intent that the franchisee be afforded the fullest protection of its interests possible.*** If the franchisee, who before the sale was fully protected by the statute, could be converted under option three to a mere trial-franchise status with only its limited protections, this would unjustifiably circumvent the protections afforded by the other two options."

In *Howard Lugar v. Texaco, Inc.*, 755 F.2d 53 (3rd Cir. 1985) the court said:

"A franchisor who relies on the grounds set forth in § 2802(b)(2)(E) or § 2802(b)(3)(D) for nonrenewal must first, if it leases the marketing premises, have made 'a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises,' or have offered the franchisee a right of first refusal. 15 U.S.C. §§ 2802(b)(2)(E)(iii)(I), 2802(b)(3)(D)(iii). See *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605-06 (8th Cir. 1984)."

In *Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 13-14 (1st Cir. 1986), the Court said:

"Under § 2804(b)(2)(A), a franchisor who elects to discontinue marketing gasoline in a given geographical market area must so notify any dealer in that area not less than 180 days before the effective termination date of the franchise. In addition, if the dealer is a lessee, the

> franchisor withdrawing from the geographical market ***must*** do one of two things: either it must make a bona fide offer to sell the franchisor's interest to the dealer (15 U.S.C. § 2802(b)(2)(E)(iii)(I)), or if the franchisor offers to sell two more of its outlets to another franchisor, it ***must insure that the proposed purchaser offers*** the dealer a 'non-discriminatory' franchise, i.e., a new franchise agreement on the same terms as offered to the purchaser's existing dealers. (15 U.S.C. § 2802(b)(2)(E)(iii)(II))." (Emphasis added).

Unocal sold to Clover Trust, who admittedly was not a franchisor and did not offer replacement franchisees. Under the controlling law, Unocal was required to first offer to sell the premises to the Dealers. This statutory obligation was breached and the Petitioners' rights were violated.

Only if the property had been sold to Tosco, would the provision of § 2802(b)(2)(E)(iii)(II) have been applied. Accordingly, the Ninth Circuit erred when it concluded that Unocal had proceeded properly under subdivision (II) of the Act.

Congress carefully and deliberately struck a balance between competing interests of a franchisor and franchisee in the context of a market withdrawal. Congress focused its attention on who would be the *purchaser* of the leased marketing premises. Only if the *purchaser* of the leased marketing premises was also the party who offered the replacement franchise could the withdrawing franchisor "ensure that a third party purchaser offers the franchisee a non-discriminatory franchise." Then and only then is subsection (II) available to the withdrawing franchisor. If the franchisor does not sell to a purchaser who will offer a replacement franchise, such as Clover Trust, the only available option for the withdrawing franchisor is to proceed in accordance with subsection (I) and thereupon offer to the

service station dealer a right of first refusal to purchase the premises that would otherwise be sold to Clover Trust, on the same terms and conditions that the leased marketing premises would be sold to the Clover Trust.

The Ninth Circuit issued its opinion which provided, in part:

> "Nothing in either logic and the purposes of the PMPA, or specifically of subsection (ii), precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves."

With this conclusion, Petitioners do not argue. Section 2802(b)(2)(E)(iii)(II) provides that a franchisor can sell, assign or transfer the franchisor's interest in the premises to another provided that *purchaser* offers a non-discriminatory franchise to the franchisee. Section 2802(b)(2)(E)(iii) states nothing about the manner of financing of a sale, as long as the *purchaser* offers the non-discriminatory franchise. Tosco argued, and the Ninth Circuit concluded, that:

> "If, as appears here, the particular details of the financing of the sale transaction had no untoward impact on the interests of the franchisees, there is no reason to find a PMPA violation."

As stated by the Ninth Circuit, as long as the secured financing utilized to facilitate the purchase and sale occurs "without adding any untoward instability to franchise arrangements," it will be permitted.

The Ninth Circuit supported its conclusion by reference to the Addendum to the Franchise Agreement in the Court's conclusion that:

> "The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination."

It is this very last conclusion that is at the heart of this Petition. It is precisely because the Addendum does *not* guarantee the franchisees a right of first refusal in the case of non-renewal or termination, and because the financing arrangements have created a *new* ground for termination of Petitioners' franchises which can result in their properties being sold to a third party without first providing a right of first refusal to purchase the property, that this financing structure in fact has placed the franchisees at risk of loss of their business and, consequently, has an untoward impact upon their interests as franchisees.

With its decision, the Ninth Circuit has determined that one does not need to be a "purchaser", as that term is defined in the PMPA, to acquire franchise rights. In other words, a party can obtain a petroleum franchise without actually purchasing it and, in so doing, may avoid the requirements of first offering the franchise to the existing franchisee as required under the PMPA. Here, the Ninth Circuit has ruled that an "option" to purchase the franchise creates an ownership interest, but is not a transfer which would trigger the rights of first refusal of the existing franchisees. This is in direct conflict with the statutory language itself, and every other circuit court of appeal that has ruled on this matter. Decisions that have held that for 15 U.S.C. § 2802(b)(2)(E)(iii)(II) to be applicable the *purchaser* must also be the party that offers the franchise include: *Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 13-14 (1st Cir. 1986); *John & Kostas Service Station, Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st

Cir. 1991) and *Ewing v. Amoco Oil Co,* 823 F.2d 1432 (10th Cir. 1987).

The PMPA does not provide that an "option to buy" is adequate. It specifically requires that the party offering the rights be the actual purchaser of the franchise. The Ninth Circuit stands alone in its construction.

B. The Ninth Circuit Court of Appeals judicially altered the PMPA by treating the holder of a mere "option to purchase" the same as a "purchaser" of a petroleum franchise.

The doctrine of separation of powers is fundamental to our democratic system of government. It is designed to limit the powers of each of the three branches of government. Under Article I of the United States Constitution, Congress has primary authority for making laws. It is proper for courts to interpret legislative enactments and to invalidate them if they are unconstitutional, but once determined, the judicial process comes to an end. The courts are not vested with the power to second guess Congress concerning what is best for the country. The courts have an obligation to avoid such "judicial legislation". *United States v. National Treasury Employees Union,* 513 U.S. 454, 115 S.Ct. 1003 (1995). Judicial legislation is a "disturbing act" and should be avoided. *City of Columbia v. OMNI Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344 (1991). In creating a new ground for termination of petroleum franchisees, the Ninth Circuit has judicially taken power away from Congress and establishes new legislation. This is in clear violation of the Constitution.

In its ruling, the Ninth Circuit has changed the terms of § 15 U.S.C. § 2802b(2)(E). It has changed the provisions which require the purchaser of a franchise who "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee",

to include someone who merely holds an "option to purchase" a franchise. By doing so, the Ninth Circuit allows the "option holder" to avoid the Petitioners" peremptory right to purchase the franchise property. Instead of respecting the lengthy and thorough efforts of Congress to precisely define and establish the requirements for market withdrawal and termination of petroleum franchises, the Ninth Circuit has taken it upon itself to create new exceptions to the legislation which completely defeat the purpose of the PMPA. Instead of protecting franchisees, the Ninth Circuit has now created a new means of striping them of their interests in their businesses. The decision of the Ninth Circuit now allows owners of "options" to avoid giving franchisees their rights of first refusal. It is Congress' position to create the legislation. It is not for the Ninth Circuit to usurp that authority and completely alter congressional intent.

A withdrawal from the market by Unocal is important and significant to the public at large. Market withdrawal by a major oil company frequently affects the entire Petroleum industry. Market withdrawals are occurring with more and more frequency. The withdrawal of a company like Unocal from a market directly affects thousands of service stations, as well as literally altering the lives of tens of thousands of station owners and their various employees.

The PMPA was enacted to give franchisees some stability in their business and personal lives by providing them with rights to maintain the business interests that they have worked so hard to establish. The construction given to the PMPA by the Ninth Circuit carves out a situation whereby a seller of petroleum franchises is encouraged to give "options" to purchase franchises, which "options" will not be exercised until long after an existing franchisee's contractual agreements have expired. In this way, the franchisee does not have to be given rights of first refusal, and a transfer of

the franchise can take place without compliance with the PMPA.

CONCLUSION

For the foregoing reasons, *certiorari* should be granted.

Dated: September 10, 1999

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BASSAM D. HINDI, et al.,
Plaintiffs,
vs.
TOSCO CORPORATION, et al.,
Defendants.

CASE NO.: CV 97-6388 ABC (SHx)

ORDER RE: Defendants' Motion for Summary Judgment; and Plaintiffs' Motions for: (1) Summary Adjudication of Issues Re: Fifth Cause of Action; (2) Leave to File a Third Amended Complaint; and (3) Summary Adjudication Re: Fourth Cause of Action

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Defendants' Motion for Summary Judgment and Plaintiffs' Motions for Summary Adjudication Re: Fifth Cause of Action came on regularly for hearing before this Court on June 29, 1998. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendant's Motion is GRANTED and Plaintiffs' motion is DENIED. It is further ORDERED that Plaintiffs' Motion for Leave to File Third Amended Complaint is GRANTED and Plaintiffs' Motion for Summary Adjudication Re: Fourth Cause of Action is DENIED.

I. Procedural Background

On August 25, 1997, Plaintiffs BASSAM D. HINDI and thirty-one other Unocal petroleum service stations franchisees (collectively "Plaintiffs") filed a Complaint for a Declaration of Rights, Damages, Injunctive Relief and the Imposition of a Constructive Trust against Defendants TOSCO CORPORATION ("Tosco"), T.NORTHWEST

PROPERTIES, INC., ("Northwest") and CLOVER TRUST 1997-1 ("Clover Trust").

On September 10, 1997, Plaintiffs filed a First Amended Complaint ("FAC"). The FAC contained the same four claims as the original complaint. In addition, the FAC contained a Fifth Cause of Action for the improper termination of a franchise in violation of the Petroleum Marketing Practices Act ("PMPA"), under 15 U.S.C. § 2801 *et seq.* The FAC also contained a Sixth Cause of Action seeking a temporary restraining order and preliminary and permanent injunctions. The FAC also named UNION OIL COMPANY OF CALIFORNIA ("Unocal") as a Defendant. Plaintiffs filed a Second Amended Complaint on May 14, 1998.

On February 2, 1998, the Court denied Plaintiffs' Motion for Summary Adjudication of Issues Re: Fifth Cause of Action ("original motion"). On May 17, 1998, Plaintiffs filed a renewed Motion for Summary Adjudication of Issues Re: Fifth Cause of Action ("renewed motion"). Defendants filed their Opposition on June 8, 1998. Plaintiffs filed their Reply on June 22, 1998. Defendants filed their Objections to Later and Improper Reply on June 24, 1998.

Also on June 8, 1998, Defendants filed a Motion for Summary Judgment. Plaintiffs filed their Opposition on June 15, 1998. Defendants filed their Reply on June 22, 1998.

Finally, on June 15, Plaintiffs filed two motions: (1) a Motion for Leave to File Third Amended Complaint; and (2) Motion for Summary Adjudication of Issues Re: the Fourth Cause of Action. Defendants filed their Oppositions to these motions on June 22, 1998. Plaintiffs filed their Reply briefs on June 29, 1998.

II. Factual Background

The facts relevant to the instant motions are as follows:

Before December 1996, each Plaintiff was a Unocal PMPA franchisee. On November 17, 1996, Unocal and Tosco signed a Letter of Intent under which Unocal agreed to sell its west coast petroleum, refining, marketing and transportation assets to Tosco. On December 14, 1996, Tosco and Unocal reached a definitive agreement as to that sale which was reflected in a Sale and Purchase Agreement (the "SPA").[1]

The SPA resulted in Unocal's impending withdrawal from the marketing and sale of motor fuel products in the States of California, Washington, Oregon, Nevada, Arizona, Hawaii, and Alaska. The SPA also expressly obligated Tosco to honor Unocal's obligations under its existing PMPA franchises. Tosco and Unocal structured the transaction so that, under the PMPA's market withdrawal provision, current Unocal franchises would be terminated by Unocal.

Section 7(b)(iii) of the SPA provides, however, that not less than seventy-five days prior to the effective date of the termination, in accordance with the PMPA, 15 U.S.C. § 2802(b)(2)(E)(iii)(II), Tosco must "offer, in good faith,

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[1]Under the SPA, Tosco agreed to purchase certain assets and assume certain obligations and liabilities of Unocal's Refining and Marketing Business. The assets sold to Tosco included, among other things: (a) Unocal's franchised petroleum marketing premises in California, Washington, Oregon, Nevada, Arizona, Hawaii, and Alaska; (b) Unocal's interest in its existing franchise agreements with its dealers; (c) all rights to "Union 76" and "76" trademarks and trademarks usually associated with the refining and sale of motor fuel and related products; and (d) additional assets, including Unocal's California refineries; various terminals, bulk plants, and pipelines; three ocean-going tankers; inventories of hydrocarbon products; a commercial lube oil business; and Unocal's proprietary credit card system.

to each franchisee leasing a retail outlet from Seller a franchise agreement of at least three years duration on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by Purchaser."

Between December 23 and 26, 1996, Unocal sent all of its California PMPA franchisees identical letters to notify them of the termination and nonrenewal of their respective PMPA franchises, effective June 30, 1997, under Unocal's PMPA market withdrawal. Each letter to Plaintiffs provided in part:

> Union Oil Company of California dba Unocal has determined in good faith and in the normal course of business to withdraw from the marketing and sale of motor fuel products in the State of California. This is to advise you that your Unocal Service Station Lease, Retail Dealer Motor Fuel Purchase Contract, or in the case of Marketers and Distributors, your Bulk Plant Lease, Marketer Sales Agreement, or Distributor Sales Agreement, and all other related agreements and programs related to your resale of "76" branded motor fuels, including any renewals and extensions of existing agreements which have already been entered into and will become effective after the date of this letter, all of which constitute your franchise relationship with Unocal, are hereby terminated and nonrenewed effective June 30, 1997.
>
> After the transactions described above occur, Tosco Corporation will offer you in good faith a new Franchise Agreement.

On March 31, 1997, Tosco and Unocal amended the SPA ("Amendment No. 1"). Amendment No. 1 provides:

> Notwithstanding the foregoing provisions of this Section 1:
>
> (i) *Designated Real Properties.* At the direction of Purchaser, Seller shall sell, transfer, assign and deliver, by deed(s), directly to CLOVER TRUST 1997-1, a Delaware business trust, marketable fee simple title in and to those parcels of Real Property set forth by unit number on Schedule 1(h) hereto (the "Designated Real Properties") and the Improvements thereon . . . .

Defendants offered evidence that on or about April 15, 1997, Tosco offered non-discriminatory franchises to all existing Plaintiffs. Plaintiffs accented Tosco's franchise offer. Attached to each Franchise Agreement submitted to all Plaintiffs was "Addendum No. 1." Addendum No. 1 provides:

> For off-balance sheet financing purposes, TOSCO's wholly owned subsidiary, T Northwest Properties II, Inc., has entered into an operating lease (the "CLOVER Lease") with Clover Trust 1997-1, a Delaware business trust ("Clover"). Clover has fee title to the land and improvements situated upon the real property subleased to DEALER hereunder and Clover has a loan with lender(s) which is secured by a deed of trust on the real property.
>
> 1. DEALER's lease from TOSCO is SUBJECT TO AND SUBORDINATE TO THE CLOVER Lease and the deed of trust.
>
> 2. TOSCO hereby reserves all rights under the PMPA to effect a termination of this Lease upon any termination or expiration of the CLOVER Lease.

> 3. CLOVER shall have the right to effect a termination of this Lease upon any termination of the CLOVER Lease.

Finally, Addendum No. 1 specifically provides that if the Clover lease terminates before the Franchise Agreement terminates:

> Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust. Thereafter, your service station lease will be directly with Tosco . . . . Further, if Tosco has determined to non-renew or terminate this Agreement, or any renewal hereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

Tosco financed its transaction with Unocal through use of a secured financing arrangement known as "synthetic leasing." In the basic synthetic lease structure, a Special Purpose Entity ("SPE") is formed to receive the loan from the lending institution, transmit the loan proceeds to the seller and acquire legal title to the properties. The SPE is not an operating entity. The acquiring company or its subsidiary (the lessee) then enters into a short-term lease with the SPE (the lessor) and has the option to acquire title to the properties at a fixed price, or through a fixed formula at a later date. The lessee assumes the operational and casualty risks of the properties, has full responsibility for operating and managing the assets, and has the attributes of ownership, including appreciation or taxes.

Tosco decided to utilize synthetic leasing to finance its acquisition of some of the properties purchased from Unocal, including the service station premises leased by Plain-

tiffs. Clover was formed as a SPE. Clover leased the subject properties to Tosco's wholly owned subsidiary, Northwest.

Under the lease with Clover, Tosco and Northwest have the right to manage, operate, and occupy the properties financed through the synthetic lease. Tosco and Northwest also have the right to sub-lease the subject properties to franchisees, including Plaintiffs. Tosco and Northwest further have the right to acquire title to the properties at the end of the lease. Finally, Tosco and Northwest have assumed the risks and liabilities associated with ownership of the properties. They pay insurance and taxes, maintain the properties, are responsible for keeping the property free of liens, bear the risk of depreciation and stand to gain from appreciation of the properties.

Plaintiffs have also provided the following "additional evidence" obtained during discovery conducted after Plaintiffs filed their original motion:

By executing Amendment No. 1 to the SPA, on March 31, 1997 (three months before the withdrawal and termination of franchises by Unocal), Unocal sold, assigned, and transferred legal title in the leased premises to Clover. Clover holds the leased premises in trust for Sanwa Business Credit Corporation ("SBCC"), the beneficial owner of the real property. SBCC capitalized the Trust with a $7,500,000 equity investment. SBCC lent approximately $240,000,000 to Clover. Clover used the loan to acquire legal title to the properties in trust for SBCC. Finally, Plaintiffs offered evidence that Clover and Tosco intended their agreement to be a lease rather than a mortgage. Only if the parties did not succeed in their stated intent did certain provisions of the agreement provide for the agreement to be considered a mortgage or a security.

Defendants' rights in the properties were limited to those created by a triple net lease with an option to purchase. If

Defendants did not exercise an option to purchase, 20-25% of the $240,000,000 loan would no longer be Defendants' obligation. Under the agreement, the parties intended the transaction between Tosco and Clover to be a lease.

III. Discussion

A. Summary Judgment Standard

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 487-88 (1984)). This means that, if the moving party has the burden of proof at trial, that party must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in that party's favor. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Furthermore, the court must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponent's claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In other words, the moving party does not have the burden to produce *any* evidence showing the absence of a genuine

issue of material fact. *Id.* at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [T]he adverse party's response . . . *must set forth specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 248; *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9th Cir. 1955).

B. Analysis

1. The PMPA

Congress enacted the PMPA to establish " 'minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier.' " *Fresher v. Shell Oil Co.*, 846 F.2d 45, 46 (9th Cir. 1988) (quoting S.Rep. No. 731, 95th Cong., 2d Sess. 15 (1978), reprinted in 1978 U.S.C.C.A.N. 873). The PMPA "protects franchisees from arbitrary or discriminatory termination of their franchises." *Id.* "It prohibits a franchisor from terminating a franchise unless the termination is based upon a ground specified in the statute

and executed in accordance with the statute's notice requirements." *Id.*

Congress designed the PMPA to allay the following three specific concerns: (1) franchisee independence may be undermined by the use of actual or threatened termination or nonrenewal to compel compliance with franchisor marketing policies; (2) gross disparity of bargaining power may result in franchise agreements that amount to contracts of adhesion; and (3) termination or nonrenewal may disrupt the reasonable expectations of the parties that the franchise relationship will be a continuing one. *Brach v. Amoco Oil Co.,* 677 F.2d 1213, 1216 (9th Cir. 1982).

Two additional concerns also govern the interpretation of the PMPA. First, the PMPA "constituted a diminution of the property rights of franchisors and thus should not be interpreted to reach beyond its original language and purpose." *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.,* 869 F.2d 917, 921 (6th Cir. 1989). Second, "the PMPA strikes an explicit statutory balance between the interests of franchisees in freedom from arbitrary and discriminatory franchise terminations and the interests of franchisors in freedom to transfer motor fuel marketing assets in response to changing market conditions." *Id.* Thus, "in an age of increasing corporate competition, the major petroleum firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *Id.;* see also *Beachler v. Amoco Oil Co.,* 112 F.3d 902, 904-05 (7th Cir. 1997) (noting that the PMPA's legislative history "suggests that Congress was seeking to strike a balance between the need to protect franchisees and the need to preserve for franchisors 'adequate flexibility so that [they] may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences' ") (quoting S.Rep. No. 731, 95th Cong., 2d Sess. at 19, reprinted in 1978 U.S.C.C.A.N. at 877); *Chest-*

nut Hill Gulf, Inc. v. Cumberland Farms, Inc., 940 F.2d 744, 750 (1st Cir. 1991) (recognizing concerns relating to franchisor).

The cornerstone of the PMPA is 15 U.S.C. § 2802, which precludes franchisors from terminating any franchise or failing to renew any franchise relationship unless certain notification requirements are met and the termination or nonrenewal is based on enumerated grounds.[2] *DuFresne's Auto Svc., Inc. v. Shell Oil Co.*, 992 F.2d 920, 925 (9th Cir. 1993). When a franchisor makes a good faith decision to withdraw from the relevant geographic market, the franchisor must follow the procedures set forth in 15 U.S.C. § 2802(b)(2)(E)(iii)(I) and (II).

Section 2802(b)(2)(E)(iii), provides that a petroleum marketing franchisor may terminate or non-renew a petroleum marketing franchise agreement, in connection with a valid market withdrawal, if:

> (I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title; either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in [leased petroleum marketing] premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

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[2]Section 2802(b)(2) sets forth the five specific grounds for termination and nonrenewal: (1) failure to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship; (2) failure to exert good faith efforts to carry out the provisions of the franchise; (3) the occurrence of an event which is relevant to the franchise relationship and makes termination or nonrenewal reasonable; (4) a written agreement to end the franchise relationship; and (5) a good faith decision to withdraw from the relevant geographic market. 15 U.S.C. § 2802(b)(2). Only the fifth ground is implicated by this case.

> (II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in [leased petroleum marketing franchise] premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E)(iii) (emphasis added).

2. Defendants' Motion for Summary Judgment Re: Plaintiffs' Fifth and Sixth Causes of Action

Defendants have moved for summary judgment on Plaintiffs' fifth (improper termination in violation of the PMPA) and sixth (injunctive relief for unfair and unlawful business practice in violation of California Business and Professions Code § 17200) causes of action. These two causes of action are based on Plaintiffs' claim that the transfer or assignment of legal title to Clover violated the PMPA. In considering Plaintiffs' original motion for summary adjudication, the Court expressly denied Plaintiffs' motion on their fifth cause of action. For the same reasons the Court previously rejected Plaintiffs' claim, the Court grants Defendants' motion. Specifically, the Court finds that Unocal did not violate the PMPA because: (1) it properly proceeded under 15 U.S.C. § 2802(b)(2)(E)(iii)(II) in that it sold *multiple franchises;* and (2) the transfer of legal title from Unocal to Clover on March 31, 1997, three months before Unocal's withdrawal and termination of franchises, was irrelevant under the PMPA.

Section 2802(b)(2)(E)(iii)(I) ("Section I"), requires the outgoing franchisor to offer to sell the premises, or to

offer the franchisee a "right of first refusal" and "contemplates the sale of a *single franchise*." *Avramidis v. Arco Petroleum Prods. Co.*, 798 F.2d 12, 15 n.7 (1st Cir. 1986) (emphasis added). In contrast, § 2802(b)(2)(E)(iii)(II) ("Section II"), which requires the purchasing franchisor to offer the dealer a nondiscriminatory franchise, applies when the franchisor purchases more than one franchise. *See id.* at 13 ("[I]f the franchisor offers to sell *two or more* of its outlets to another franchisor, it must ensure that the proposed purchaser offers the dealer a 'nondiscriminatory' franchise — i.e., a new franchise agreement on the same terms as offered to the purchaser's existing dealers.") (emphasis added) (citing Section II).

Plaintiffs contend that Unocal was required to proceed under Section I. Because Unocal failed to do so, Plaintiffs contend that Unocal violated the PMPA. Specifically, Plaintiffs contend that Unocal could proceed under Section II only if the party purchasing the leased marketing premises was the same party that offers the replacement franchise. Opposition to S.J. at 13. Because Unocal sold the leased marketing premises to Clover and Clover did not offer a non-discriminatory franchise to Plaintiffs, Plaintiffs assert that Unocal had to proceed under Section I and either sell the premises to the franchisee or grant the franchisee a right of first refusal to purchase the premises. As this Court noted in denying Plaintiff's original motion, Plaintiffs' claim is without merit.

In this case, it is undisputed that Unocal sought to sell *multiple service stations* to Tosco. Thus Unocal had to proceed under Section II, which it did. *See Avramidis,* 798 F.2d at 15 n.7. As noted above, Section II allows the outgoing franchisor to "sell or trade its franchise so long as the purchasing party 'offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee.' " *Southern Nevada Shell Dealers'*

Ass'n, 725 F. Supp. 1104, 1107 (D. Nev. 1989) (quoting Section II). On or about April 15, 1997, as required under Section II, Tosco offered franchises to all existing Unocal franchisees, including Plaintiffs. Thus, Unocal and Tosco properly proceeded under Section II.

Plaintiffs also argue that SBCC's status as the beneficial owner of the premises invalidated the later termination of franchisees and offers from Tosco. Even if Clover holds the leased premises in trust for SBCC, the beneficial owner of the real property, this fact does not alter the Court's conclusion that Unocal's transfer of legal title to Clover, three months before Unocal's withdrawal and termination of franchises (and SBCC's subsequent status as beneficial owner), did not violate the PMPA. Rather, the Court has previously concluded that the PMPA does not govern Plaintiffs' relationship with Clover. Clover is not a franchisor and no contract has ever existed between Plaintiffs and Clover.

15 U.S.C. § 2801 defines the essential terms of the PMPA. That section defines "franchisee" as "a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801(4). "Franchisor" is defined to mean "a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel." *Id.* § 2801(3). That provision indicates that "franchise" means any contract between a refiner and a distributor, a refiner and a retailer, a distributor and another distributor, or between a distributor and a retailer

> under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by

> such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

Id. § 2801(l)(A).

In this case, Clover is not a franchisor. Clover also is not "a refiner or distributor" as defined by the PMPA. *Id.* § 2801(3). Moreover, Clover did not and could not authorize "a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel." *Id.* § 2801(3). Finally, it is clear that Clover did not enter into any contract with Plaintiffs. Rather, Clover's dealings related solely to Tosco with respect to the synthetic leasing.

The decision in *Brown v. American Petrofina Marketing, Inc.*, 555 F. Supp. 1327 (M.D. Fla. 1983) is also instructive. In *Brown*, American Petrofina ("Fina") held fee simple title to several service stations. Fina then leased those premises to Clay. Clay, in turn, leased the premises to the plaintiffs, who operated them as retail gasoline and service outlets. *Id.* at 1329-30. A dispute arose concerning the proposed sale of the premises from Fina to Clay. *Id.* at 1330. The franchisees then brought suit seeking to enjoin the proposed sale.

The Court found that the PMPA did not control Fina's relationship with the plaintiffs because no contract ever existed between Fina and the plaintiffs. The Court noted that "the PMPA regulates *franchise relationships between a franchisor and a franchisee* and that central to such a relationship is the existence of a contractual agreement between the parties." *Id.* at 1331. Thus, although Fina held fee simple title to the premises, the Court concluded that the PMPA only governed the relationship between Clay, the franchisor, and Plaintiffs, the franchisees.

The *Brown* Court noted that the plaintiffs were not entitled to the PMPA's protections with respect to Fina because Fina and the plaintiffs did not have a contract

"which pertains to the sale or distribution of motor fuel." *Brown*, 555 F. Supp. at 1332. Rather, Fina's dealings were exclusively with Clay. The Court stated:

> [P]laintiffs dealt with Clay in maintaining and operating their service station and all lease negotiations were conducted with Clay. No other evidence was introduced which could cause the Court to reach a contrary conclusion. Furthermore, no allegations were made that Fina employed Clay as an artifice to circumvent the provisions of the PMPA. Clearly, such an allegation would have been groundless. Fina and Clay are independent entities which have dealt at arms length throughout this matter. This is evidenced by the several legal actions instituted between them. Given the absence of any contract or other agreement, the Court finds that plaintiffs, with respect to Fina, are not franchisees within the terms of the PMPA.

Id. at 1332.

In this case, as in *Brown*, the PMPA does not control the relationship between Plaintiffs and Clover because no contract ever existed between them. Without a contractual agreement, Plaintiffs and Clover did not have a franchisor/franchisee relationship. *See id.* at 1331. As in *Brown*, the Plaintiffs in this case dealt with Tosco, which is responsible for maintaining and operating the service stations. *See id.* at 1332. Thus, even though Clover has "legal title" to the premises under the synthetic lease with Tosco, the PMPA does not create any relationship between Clover and Plaintiffs.

Although Plaintiffs have offered evidence that SBCC, rather than Tosco, was the beneficial owner of the premises, that fact does not alter the Court's conclusion that Defendants complied with the PMPA's requirements. The evidence reflects that Unocal's transfer of legal title to Clover was in the context of a synthetic lease financing transaction.

Tosco's Treasurer, Craig Deasy, requested that SBCC prepare a proposal for synthetic lease financing. Further, Addendum No. 1. demonstrates that Clover was created for synthetic lease purposes to serve as an off balance sheet financing vehicle consistent with the guidelines of the Financial Accounting Standards Board. The Court also notes that SBCC's status as beneficial owner is irrelevant for the same reason that Clover's status is irrelevant — SBCC is not a franchisor, or a "refiner or distributor." Moreover, SBCC did not enter into any contract with Plaintiffs. Thus, SBCC, like Clover, did not have a franchisor/franchisee relationship with Plaintiffs.

For all these reasons, the Court GRANTS Defendants' motion for summary judgment with respect to Plaintiffs' Fifth and Sixth causes of action.

3. Plaintiffs' Motion for Summary Adjudication Re: Fifth Cause of Action

This Court has previously denied Plaintiffs' original motion for Summary Adjudication of Issues Re: Fifth Cause of Action. Nevertheless, Plaintiffs have filed a renewed motion for summary adjudication on this issue. *See Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc.*, 922 F. Supp. 1439, 1442 (N.D. Cal. 1996) ("A moving party may renew a motion for summary judgment notwithstanding denial of an earlier motion by showing a *different set of facts or some other reason justifying renewal* of the motion.") (emphasis added).

Plaintiffs base their renewed motion on four facts: (1) Clover holds the property in Trust for SBCC; (2) SBCC is the beneficiary of the Clover Trust; (3) the Trust Certificates declare that Clover is the beneficial owner of the properties; and (4) Clover and Tosco intended that the lease be treated as a lease. None of these facts, however,

persuades the court that Plaintiffs are entitled to summary judgment on their fifth cause of action.

First, Plaintiffs argue that Unocal had to proceed under Section I because Unocal sold, transferred and assigned the title to the properties to Clover. Motion for S.A. at 9. In considering Defendants' motion for summary judgment, however, the Court expressly rejected Plaintiffs' claim that Unocal had to proceed under Section I. The Court has concluded that Tosco, not Clover, was the new franchisor. Further the Court concluded SBCC's status as a beneficial owner was irrelevant because the PMPA did not govern any relationship between Clover and the Plaintiffs.

Second, Plaintiffs argue that they are not protected by Tosco's statement that Tosco will exercise its right to possession of the service station properties should its lease with Clover terminate before the dealer Franchise Agreements.[3] The Court has previously rejected this specific claim.

Addendum No. 1 specifically provides that if the lease with Clover terminates before the Franchise Agreement terminates: *"Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust.* Thereafter, your service station lease will be directly with Tosco." Because Tosco will purchase the subject property from Clover should the lease with Clover terminate before the Franchise Agreements terminate, Tosco retains a possessory interest in the property. Thus, Tosco will not lose its right to possession.[4]

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[3]The Court notes that Plaintiffs cite no new evidence or law in support of this claim. Thus, it is procedurally defective.

[4]Addendum No. 1 also provides:

'[I]f Tosco has determined to non-renew or terminate this Agreement, or any renewal hereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the

Finally, Plaintiffs take issue with this Court's prior reliance on *Brown v. American Petrofina Marketing*. Because Plaintiffs provide no basis for challenging this Court's prior ruling on this issue, it is procedurally defective and the Court declines to consider it.

For all these reasons, the Court DENIES Plaintiffs' Motion for Summary Adjudication Re: Fifth Cause of Action.

4. Defendants' Motion for Summary Judgment Re: Plaintiffs' First through Fourth Causes of Action

Defendants have also moved for summary judgment on Plaintiffs' first (declaratory relief), second (damages), third (injunctive relief), and fourth (imposition of a constructive trust) causes of action.[5] Plaintiffs' Third Amended Complaint alleges that Unocal sold, transferred, and assigned the leased marketing premises to Clover. Plaintiffs also allege that because the sale occurred before the termination of any franchise to permit a market withdrawal, the Plaintiffs were

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> right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

This further demonstrates that Tosco will not lose its possessory rights and that Plaintiffs' Franchise Agreements remain unaffected by Tosco's synthetic lease with Clover.

[5]Plaintiffs' Second Amended Complaint alleges that "in the event" that title was transferred first from Unocal to Tosco, and subsequently from Tosco to Clover, such transfers violated California Business & Professions Code § 20999.25(a). *See* Second Am. Cmplt., § 24. Defendants correctly note that the allegations contained in Plaintiffs' Second Amended Complaint are not supported by the evidence because Unocal did not first transfer Plaintiffs' properties to Tosco.

Nevertheless, Plaintiffs have filed a motion for leave to file a Third Amended Complaint to "conform the pleading to the facts discovered." Motion for Leave to Amend at 2. Accordingly, the Court GRANTS Plaintiffs' motion for leave to amend to correctly set forth the facts relating to the transfer of Plaintiffs' properties.

entitled to a right to purchase the premises under California Business & Professions Code § 20999.25(a). Third Am. Cmplt., § 24.

Because the Court concludes that each of Plaintiffs' claims under § 20999.25(a) is preempted by the PMPA, Defendants are entitled to summary judgment on Plaintiffs' first through fourth causes of action.

Section 20999.25 provides:

> (a) In the case of leased marketing premises as to which the franchisor owns a fee interest, the franchisor shall not sell, transfer, or assign to another person the franchisor's interest in the premises unless the franchisor has first either made a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interest in the premises, other than signs displaying the franchisor's insignia and any other trademarked, servicemarked, copyrighted or patented items of the franchisor, or, if applicable, offered to the franchisee a right of first refusal of any bona fide offer acceptable to the franchiser made by another to purchase the franchisor's interest in the premises.
>
> * * *
>
> (c) Nothing in this section shall be deemed to require a franchisor to continue an existing franchise agreement or renew a franchise relationship if not otherwise required by federal law.

Cal. Bus. & Prof. Code § 20999.25(a), (c).

The PMPA was intended to provide a single, uniform set of rules governing termination and non-renewal of petroleum marketing franchises and to reduce friction between franchisors and franchisees in the marketing of motor fuels. *See Humboldt Oil Co., Inc. v. Exxon Co, USA,* 823 F.2d 373, 374 (9th Cir. 1987). "In enacting the PMPA, Congress

attempted to provide national uniformity of petroleum franchise termination law. The purpose of uniformity would be frustrated if the PMPA was not given its preemptory intent." *Id.* at 374-75; *Pride v. Exxon Corp.*, 911 F.2d 251, 258 (9th Cir. 1990). Thus, the PMPA preempts all inconsistent state law. *See id.* ("[S]tate law is preempted by the [PMPA] to the extent that it frustrates federal objectives and when it is inconsistent with the [PMPA]").

Preemption of inconsistent state law by federal statutory schemes, however, is not particular or unique to the PMPA. The Supremacy Clause of the United States Constitution mandates that federal law will override and preempt state law when state law is in "actual conflict" with federal law. *See Maryland v. Louisiana*, 451 U.S. 725, 745-47 (1981). This type of preemption is commonly known as "conflict preemption." Conflict preemption is found to exist in cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Freightliner Corp. v. Myrick*, ____ U.S. ____, 115 S.Ct. 1483, 1487 (1995). In the instant case, the Court finds that conflict preemption analysis is appropriate to determine whether § 20999.25(a) is preempted by the PMPA.[6]

District Court Judge Armstrong of the Northern District of California first addressed this issue in *Nick Arbabian*,

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[6]Because the Court's analysis deals with "conflict preemption" it need not address at length whether the scope of the PMPA's "express preemption" clause, 15 U.S.C. § 2806(a), is sufficient to preempt § 20999.25(a). The Court does note, however, that the express preemption clause of the PMPA is quite broad, and can be held to extend to state law that serves to abridge any of the provisions of the PMPA, including the procedures prescribed for termination of a franchise in connection with a market withdrawal involving leased petroleum marketing premises — Section II.

et al. v. BP America, et al., Case No. C 94-0523 SBA, in a case involving facts similar to those at issue here. In *Arbabian*, the court ruled that § 20999.25(a) was preempted by the PMPA.[7] The Court is persuaded by the analysis set forth in *Arbabian* and adopts its conclusion that the PMPA preempts § 20999.25(a).

In its dismissal order, the Arbabian court held that § 20999.25(a) was preempted by the PMPA based on "conflict preemption" because both statutes attempted to regulate a petroleum franchisor's market withdrawal obligations. In cases of conflicting state and federal regulation of the same conduct, state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Maryland v. Louisiana,* 451 U.S. at 745-47 (quoting *Hines,* 312 U.S. at 67).

The parties do not dispute that the instant case involves Unocal's market withdrawal pursuant to 15 U.S.C. § 2802(b)(2)(E). A side-by-side comparison of § 20999.25(a) with the PMPA at 15 U.S.C. § 2802(b)(2)(E)(iii) reveals that, in the case of a franchisor's market withdrawal involving the sale or assignment to a third party of the franchises and real property upon which the service stations are located, § 20999.25(a) and the PMPA impose conflicting requirements and obligations on the franchisor. Under § 20999.25(a), the franchisor is *required* to make a bona fide offer to the franchisee for the purchase of the real property. In contrast, under the PMPA, where the franchisor sells or assigns to a third party more than one franchise as part of a market withdrawal, the franchisor has the *option* of making a similar bona fide offer

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[7]The Court so ruled in an unpublished order, which was subsequently mentioned briefly in *Arbabian v. BP America,* 898 F. Supp. 703, 706 (N.D. Cal 1995). Under Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice of Judge Armstrong's December 15, 1994 Order ("dismissal order").

during the 180-day period under § 2804 *or* the assignee of the franchises and real property must offer, in good faith, a non-discriminatory franchise to the franchisee.

By mandating a bona fide offer or right of first refusal, § 20999.25(a) effectively precludes a franchisor from selling or assigning without encumbrance its franchises and real property to an assignee, who will offer non-discriminatory franchises to the franchisees. In effect, § 20999.25(a) functions to eliminate a franchisor's *option,* which Congress expressly provided for in the PMPA. In this way, § 20999.25(a) directly conflicts with the provisions of the PMPA and is preempted under the principles articulated by the Supreme Court in *Hines,* and by the Ninth Circuit in *Humboldt.*

Plaintiffs contend, however, that § 20999.25(a) does not conflict with the PMPA in this case. Plaintiffs note that in March 1997, three months prior to the market withdrawal and termination, Unocal sold and assigned the premises to Clover. Thus, Plaintiffs argue that § 20999.25(a) applies where, as here, a transfer of franchise premises and franchise agreements occurs without termination or renewal. This contention is without merit.

The evidence unequivocally demonstrates that Unocal sold and assigned the franchises to Clover in the context of a market withdrawal and termination. First, on November 17, 1996, Unocal and Tosco signed a Letter of Intent under which Unocal agreed to sell its west coast petroleum, refining, marketing and transportation assets to Tosco. Second, on December 14, 1996, Tosco and Unocal agreed to the sale as reflected the SPA. Third, in effectuating its market withdrawal in this case, Unocal sent termination notices to each Defendant. Finally, the SPA specifically required termination of the existing franchises. Specifically, Section 7(b)(iii) of the SPA provided, in accordance with Section II of the PMPA, that Tosco must "offer, in good

faith, to each franchisee leasing a retail outlet from Seller a franchise agreement of at least three years duration on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by Purchaser."

Tosco's decision to finance the transaction with Unocal through synthetic leasing does not alter the nature of the transaction. Unocal and Tosco's actions are entirely consistent with Unocal's intent to withdraw from the market and terminate its existing franchises. Accordingly, Unocal did not engage in an independent transaction — an assignment and sale to Clover. Rather, Unocal acted under its express intent to withdraw from the market and terminate its existing franchises. Thus, it is irrelevant that the actual franchise termination did not occur until June 1997.

For the reasons stated above, Plaintiffs' reliance on *Forty-Niner Truck Plaza Inc. v. Union Oil Co. of California,* 68 Cal. Rptr. 2d 532 (Cal. App. 1997) is unavailing. In that case, the California Court of Appeals held that the PMPA did not preempt § 20999.25(a). *Id.* at 540. The Court so held, however, in the context of an assignment rather than a franchise termination or nonrenewal. *Id.* Finding *Forty-Niner* distinguishable because this case involves a withdrawal and termination, the Court concludes that the PMPA preempts § 20999.25(a).

Finally, Plaintiffs argue that Unocal effectively waived its right to terminate the franchise agreements. Thus, Plaintiffs contend that the PMPA's notice of termination was rendered moot. Opposition to S.J. at 22. As set forth above, Plaintiffs' reliance on *Sawhney v. Mobil Oil Corp.,* 970 F. Supp. 366 (D.N.J. 1997) and *Cedar Brook Svc. Station, Inc. v. Chevron U.S.A., Inc.,* 746 F. Supp. 278 (E.D.N.Y. 1990), however, is misplaced.

In *Sawhney* the Court merely stated the general rule that "assignments and delegations will not rise to the level of a termination or nonrenewal so long as the essential characteristics of the franchise remain intact." *Sawhney,* 970 F. Supp. at 371. The Court further stated: "The PMPA neither authorizes nor prohibits the assignment of one's franchise rights and the delegation of one's franchise duties. Instead, the Act leaves such matters to state law." *Id.* at 371-72. *See also Cedar Brook,* 746 F. Supp. at 282 (concluding that a valid assignment "does not make the assignment a termination of a franchise or a failure to renew the franchise relationship"). Thus, these cases stand for the unremarkable proposition that an assignment does not constitute a market withdrawal or franchise termination. These cases are inapposite to the instant case, however, where the assignment was in the context of and directly related to Unocal's market withdrawal and termination. Accordingly, the assignment from Unocal to Clover, that preceded the actual franchise termination by three months, did not result in a waiver of Unocal's right to terminate the franchise agreements.

For all these reasons, the Court GRANTS Defendants' motion for summary judgment with respect to Plaintiffs' first, second, third, and fourth causes of action.[8]

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[8]For the same reasons the Court Grants Defendants' motion for summary judgment, the Court DENIES Plaintiffs' Motion for Summary Adjudication of Issues Re: the Fourth Cause of Action.

IV. Conclusion

For the reasons discussed above, the Court hereby GRANTS: (1) Defendants' Motion for Summary Judgment in its entirety; and (2) Plaintiffs' Motion for Leave to File a Third Amended Complaint. The Court, however, DENIES: (1) Plaintiffs' Motion for Summary Adjudication of Issues Re: Fourth Cause of Action; and (2) Plaintiffs' Motion for Summary Adjudication of Issues Re: Fifth Cause of Action.[9]

SO ORDERED.

Dated: _____

_____

Audrey B. Collins
United States District Judge

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[9]The Court also DENIES Defendants' Request for Sanctions made in its Opposition to Plaintiffs' Motion for Summary Adjudication on the Fifth Cause of Action.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA,

Plaintiffs-counter-claimants-Appellees,

v.

EBRAHIM KAABIPOUR, dba, Sunnyvale Unocal & dba, Santa Clara Unocal; HASSAN KHAZIRI; HOSSAIN KHAZIRI; MOHSEN KHAZIRI; EVERGREEN UNION SERVICES, INC., DBA EVERGREEN UNOCAL; FARIBORZ NICKBAKHSH-TALI, aka, Nick, ALI RAGHIAN, dba, Al's Unocal; THUY GIA NGUYEN; LEAVESLEY RD. UNION 76 INC.; NOAH TOLLISON; TOM W. BARNUM, dba, Cuperrino Union; DAVID J. JOINES, DBA, UNOCAL AT NORTH FIRST AND BROKAW; RONALD GENE DIEDRICH; DBA, LA JOLLA TIRE AND SERVICE CENTER; MARK HORNE; VU HADOUNG, DBA, SAN MATEO UNOCAL; TINOOSH EFTEKHARIAN, DBA, SUNNYSIDE UNOCAL,

Defendants-counter-claimants-Appellants.

v.

TOSCO CORPORATION,

Counter-defendant-Appellee.

No. 97-56324

D.C. No.
CV-97-00161-ABC

CHARLES SIMMONS; YOSUF HOMAYUN; SEUNG K. CHOI; DAVID AVISRUR; MEHRAN MIKE HARIRI; MEIR BEN-DAVID; FRED PAKZAD; A.H.B. PROPERTIES, INC.; MANASSEH BAREH; OMID BADAKHSH; DALLA, INC.; ASGHAR KHOLDI; STEVEN TEDESCO; AKBAR AKRAMI; S.M.B. CORPORATION; JAVAD S. TAAT; SABOUR ANDKHOY; WARM SPRINGS UNOCAL, INC.; BASIR ANDKHOY; LAWRENCE E. RAETHER; ATA TAJYAR; ALI MAJDI; SAGAHOH, INC.; MANSOR GHNEEIAN; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; SAYED HASHEMYAR; GEORGE BENJAMIN; JOHN OTTE; TOROS K. DEURDULIAN; KEVORK KASBARIAN,

Plaintiffs-Appellants,

v.

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA; 76 PRODUCTS COMPANY, INC.; TOSCO CORPORATION,

Defendants-Appellees.

No. 98-56216
D.C. No.
CV-97-01759-ABC

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

v.

ROBERT CASSEL,

Defendant,

and

MOHSEN KHAZIRI; CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAJDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHANEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.; DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; GEORGE BENJAMIN,

Defendants-Appellants.

No. 98-56631
D.C. No.
CV-97-00161-ABC

BASSAM D. HINDI; BEHROUZ SHIRDEL; MOHAMAD SHIRDEL; CARPINTERIA CAR CARE, INC.; CHI TAI; DANIEL LEE O'NEAL; DANIEL W. LENTZ; FAYE FOUAD; RAY FOUAD; FRANK E. JAKEL; GREGORY MESNA; GWENDOLYN MESNA; HARRY PERRY; HAYK BAZIK; HOVICK G. SADEGHI; JAVAD HAGHI; JOHN OTTE; MAURO ANTENNCEI; ONNIK NICK MATHEVOSSIAN; PAUL A. HILLES; SAID SAIDATI; SALIM JAVAHIERI; TRACY FINNEL; VAN DUONG; BRADLEY DEBOER; EMRY BROTHERS INVESTMENTS, a general partnership; DENNIS AZZARELLO; VAHANEK KUPELIAN; M&K ENTERPRISES, INC., a California Corporation; STEPHEN NG; COUNTRY CLUB UNION, INC.; JOHN HIFAI; PATRICIA HILLES; SAEID SABOUR; TOMMY GENDAL,

Plaintiffs-Appellants,

v.

TOSCO CORPORATION; T NORTHWEST PROPERTIES II, INC.; CLOVER TRUST 1997-1, a DELAWARE Business Trust; UNION OIL COMPANY OF CALIFORNIA, a California corporation,

Defendants-Appellees.

No. 98-56365
D.C. No.
CV-97-6388-ABC
OPINION

Appeals from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
April 14, 1999—Pasadena, California

Filed May 18, 1999

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, and William A. Fletcher, Circuit Judges.

Opinion by Judge Fernandez

SUMMARY

Business Law / Franchising

The court of appeals affirmed a judgment of the district court. The court held that the Petroleum Marketing Practices Act (PMPA) does not preclude the transferee of a franchisor's interest in service stations from financing the purchase and using the premises as security.

Appellee Union Oil Company of California is a subsidiary of appellee Unocal Corporation that conducts the corporate parent's refining, transportation, and marketing business. Union Oil's business unit was 76 Products Company, which managed over 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. The stations were operated under the terms of franchise agreements governed by the PMPA, with the station premises leased to the franchisees.

In October 1996, Unocal decided that the assets and employees of the 76 Products business unit should be transferred to a separate subsidiary. Union Oil also considered other options for restructuring 76 Products, concluding that the business unit could be established as a separate entity, possibly by a sale of its assets. Plans for this change would depend on 76 Products' ability to generate earning and cash flow sufficient to stand alone.

In late October 1996, Tosco Corporation offered to buy 76 Products. On December 2, Unocal's board of directors approved a resolution authorizing an agreement with Tosco. The sale took place shortly afterward, and under the PMPA constituted a "market withdrawal" by Union Oil from the motor fuel market in 76 Products' operating area. The assets of 76 Products included the premises of "76" service stations; Union Oil's interests in the franchise agreements; the rights to the "76" and "Union 76" trademarks; and tangible assets such as refineries, pipelines, and tankers.

Under the sale agreements, Union Oil was to terminate its franchises, but Tosco had to offer the franchisees a nondiscriminatory three-year Tosco franchise. Union Oil notified the franchisees of the termination and nonrenewal of their franchises, effective June 30, 1997, and also notified the governors of the affected states.

Tosco offered franchises to the Union Oil franchisees with contracts that essentially mirrored those between the franchisees and Union Oil. However, an addendum structured the transactions with a financing device known as a "synthetic lease." Tosco put title to some of the franchise premises in Clover Trust, which would lease them to Northwest Properties II, Inc., a Tosco subsidiary. The leases were subject to and subordinate to the lease with Clover Trust and its purchase-money deed of trust.

The addendum reserved for Tosco the right to terminate a lease on any termination or expiration of the Clover Trust lease; Clover Trust could terminate a lease on any termination of its lease. If the Clover Trust lease were to terminate before a franchise agreement did, Tosco would exercise its option to buy the real property and improvements, after which the premises would be leased from Tosco. The addendum also stated that if Tosco decided to non-renew or terminate a franchise agreement, the franchisee would

receive a PMPA-mandated bona fide offer or right of first refusal to buy the service station.

Sanwa Business Credit Corporation (SBCC) loaned Clover Trust money for the purchase of 76 Products; Clover Trust paid the money to Union Oil, took over 76 Products' properties in trust for SBCC, and entered into a short-term lease with Northwest. Tosco retained the option of acquiring the property at the end of the lease based on a fixed formula; if it did not, 20 to 25 percent of the original loan would not be its obligation.

Tosco intended the Clover Trust transaction to be deemed a secured loan for tax purposes, that it would have all the benefits and burdens of ownership, and that payments of termination value and fixed rent would be treated as payments of principal and interest. Tosco and Northwest assumed all operational and casualty risks for the properties (including the obligation to obtain insurance), and all responsibility for their maintenance and management.

Disputes arose after the transaction between Tosco and Union Oil was completed. Unocal and Union Oil brought a federal declaratory action against various groups of California franchisees, alleging that the withdrawal from the sale of motor fuels in California and the sale of the marketing assets to Tosco did not violate the PMPA.

The Kaabipour Group counterclaimed for declaratory and injunctive relief under Cal. Bus. and Prof. Code § 20999.25(a), seeking a right of first refusal on the transfer of the station premises to Tosco. The district court dismissed the counterclaim, ruling that it was preempted by the PMPA. The Kaabipour Group appealed. Litigation involving the Raether Group continued until the court granted summary judgment for Unocal, Union Oil, and Tosco. The Raether group appealed.

The Simmons Group and the Hindi Group also filed separate actions, seeking an injunction, declaratory relief, and a constructive trust. In the aggregate, their complaints alleged that Union Oil violated the PMPA (and § 2099.25(a)) by entering into and renewing franchise agreements after it had decided to withdraw from the market, and by selling the premises without first offering the franchisees a sale or right of first refusal. They also charged that Tosco violated the PMPA by failing to offer nondiscriminatory franchises. The district court granted summary judgment against the Simmons Group and the Hindi Group, and they appealed.

[1] The PMPA provides that a determination by a franchisor, in good faith and in the normal course of business, to withdraw from marketing motor fuel through retail outlets is a ground for termination of a franchise or nonrenewal of a franchise relationship if it is made after the date the franchise was entered into or renewed, and is based on changes in relevant facts and circumstances after that date.

[2] Union Oil's decision to withdraw from the market had to be made after the franchises were entered into or renewed. The latest renewal was October 1, 1996. The withdrawal determination was on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. **[3]** Generally, approval of the franchisor's board of directors constitutes the legally effective date of a decision for PMPA purposes. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect. **[4]** The relevant facts and circumstances changed after October 1, 1996 because only after that date was a sale to Tosco negotiated and a decision to withdraw reached.

[5] When a franchisor terminates or non-renews existing franchises or franchise relationships as part of a market

withdrawal, the franchisor can either grant the franchisee a chance to match a bona fide offer to purchase the premises, or sell, assign, or transfer the franchisor's interest in the premises to another person who will offer a nondiscriminatory franchise to the franchisee. The old and new franchisor must act in a manner consistent with the franchisee's reasonable expectation of continuing the franchise relationship.

[6] Clover Trust was not a franchisor. It had not entered into any contractual relationship with the franchisees. Clover Trust was part of a special purpose financing arrangement whereby Tosco in effect purchased the property, and Tosco was capable of offering nondiscriminatory franchises to the former Union Oil franchisees. **[7]** Nothing in the PMPA precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing the financing with the premises themselves. If the financing of the sale transaction has no untoward impact on the interests of the franchisees, there is no reason to find a PMPA violation.

[8] Tosco's ownership of the premises was always real. General law treats synthetic lease arrangement as transparent for tax and other purposes. A synthetic lease is treated as an operating lease for accounting purposes, but is otherwise regarded as a secured loan. **[9]** The cumulative arrangements resulted in a single transaction whereby Tosco took over the ownership role formerly held by Union Oil.

[10] Tosco included in the addendum a statement that it would purchase the property from Clover Trust if the lease ended before the termination of the franchise agreement. The addendum also guaranteed the franchisees a right of first refusal pursuant to the PMPA in case of non-renewal or termination. Tosco was bound to protect the franchisees' expectations of an ongoing franchise relationship.

[11] The franchisees did not show any interests put at risk by the method used to sell the premises to Tosco. The franchisees were all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 Products had a more conventional financing arrangement been used.

[12] Pursuant to the requirements of the PMPA, a franchisor may sell its franchise to another franchisor so long as the purchasing party offers, in good faith, a franchise to the franchisee on terms and conditions that are not discriminatory. The terms need not be identical to those of every other franchise agreement. The PMPA requires only that the franchise be in terms similar, i.e., nondiscriminatory to other franchises currently in effect, or currently being offered by the purchasing franchisor. **[13]** The "good faith" requirement looks to whether the franchisor's actions are designed to conceal selective discrimination against individual franchisees.

[14] It was hard to see how the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco. The mere fact that the amount of rent may have differed from one place to another did not show discrimination. That was especially true when the complaining group members were all located in California, whereas the agreements to which they wished to be compared referred to franchisees in other states, who were accustomed to a different leasing regime.

[15] In enacting the PMPA, Congress attempted to provide national uniformity of petroleum franchise termination law. That uniformity would be frustrated if the PMPA did not preempt all inconsistent state law. **[16]** However, the preemptive scope of the PMPA does not reach state laws that only incidentally affect franchise termination or non-renewal.

[17] Section 20999.25(a) parallels the PMPA in seeking to protect the franchisee's reasonable expectation of continuing its business while allowing the franchisor adequate flexibility to respond to changing market decisions. **[18]** While § 20999.25(a) parallels the PMPA, it does not invade the PMPA sphere. The PMPA covers franchise termination and non-renewal, while § 20999.25(a) encompasses a situation where the franchisor is going to sell the service station premises, but will assign rather than end the franchise arrangement. Section 20999.25(a) is not designed to cover franchise termination or nonrenewal in a way different from the PMPA.

[19] Union Oil was engineering a market withdrawal involving the termination of franchise agreements, and was selling its franchise business and the premises. Because the federal and state provisions occupied different spheres, and this case was within the context of franchise termination or non-renewal, the federal provision controlled.

[20] The PMPA does not state that in a complex transfer, everything must happen on one day. It merely provides that a franchisor may terminate or fail to renew a franchise, if it is withdrawing from the market, transfers the premises to a new franchisor, and the new franchisor makes a proper offer of a new franchise. That is what happened in this case.

[21] Tosco had to own the property before it could offer new franchises. The approach used gave the franchisees enough time to consider the new agreements. This timing mechanism is a procedure generally utilized in market withdrawals when a new franchise will be offered to franchisees by the purchasing franchisor.

COUNSEL

James R. Carroll and Richard L. Dooley, Law Offices of Carroll, Gilbert & Bachnor, Brea, California, for the defendants-counter-claimants-appellants in No. 97-56324.

Joseph M. Alioto, Alioto Law Firm, Daniel R. Shulman, Shulman, Walcott & Shulman, Minneapolis, Minnesota, for the plaintiffs-appellants in No. 98-56216 and for the defendants-appellants in No. 98-56631.

Kenneth P. Roberts, Kenneth, Roberts, APLC, Woodland Hills, California, for the plaintiffs-appellants in No. 98-56365.

John J. Wasilczyk and Kenneth L. Waggoner, Brobeck, Phleger & Harrison, Los Angeles, California, for plaintiffs-counter-defendants-appellees Unocal Corporation and Union Oil Company.

Gregory N. Pimstone, Latham & Watkins, Los Angeles, California, for defendants-appellees Tosco Corporation.

OPINION

FERNANDEZ, Circuit Judge:

These cases arise out of the withdrawal of Union Oil Company from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In so doing, Union Oil sold all of its marketing assets to Tosco Corporation. A number of former Union Oil franchisees objected to the sale on various grounds. The district court ruled against all of them and these appeals ensued.

One group, the Kaabipour Group,[1] asserts that the district court erred when it declared that the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-06, preempts California law as far as this transaction is concerned. Another group, the Simmons Group,[2] asserts that the district court erred when it decided that Union Oil and Tosco properly adhered to the provisions of the PMPA regarding withdrawal from the market, despite the Simmons Group's claims that they violated the timing, new franchise offer, and transfer of premises provisions of the PMPA. *See* 15 U.S.C.

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[1]This group appealed in No. 97-56324 and consists of EBRAHIM KAABIPOUR, dba. Sunnyvale Unocal & dba, Santa Clara Unocal; HASSAN KHAZIRI; HOSSAIN KHAZIRI; MOHSEN KHAZIRI; EVERGREEN UNION SERVICES, INC., dba Evergreen Unocal; FARIBORZ NICKBAKHSH-TALI, aka, Nick; ALI RAGHIAN, dba, Al's Unocal; THUY GIA NGUYEN; LEAVESLEY RD. UNION 76 INC.; NOAH TOLLISON; TOM W. BARNUM, dba, Cupertino Union; DAVID J. JOINES, dba, Unocal at North First and Brokaw; RONALD GENE DIEDRICH; dba, La Jolla Tire and Service Center; MARK HORNE; VU HADOUNG, dba, San Mateo Unocal; TINOOSH EFTEKHARIAN, dba, Sunnyside Unocal.

[2]This group appealed in No. 98-56216 and consists of CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAJDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHNEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.; DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; TOROS DEURDULIAN; and KEVORK KASBARIAN.

§ 2802(b)(2)(E)[3] A third group, the Raether Group[4], asserts that the district court erred when it decided that Union Oil and Tosco properly adhered to the provisions of the PMPA regarding withdrawal from the market, despite the Raether Group's claims, which were the same as the Simmons Group's PMPA claims. The final group, the Hindi Group,[5] asserts that the district court erred when it decided

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[3]The Simmons Group also raised other claims which we have addressed in an unpublished memorandum disposition.

[4]This group appealed in No. 98-56631 and consists of CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAJDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHNEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.; DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; GEORGE BENJAMIN. We have adopted the designation "Raether Group" to distinguish it from the Simmons Group, from which it differs only slightly. The careful reader will see that the caption for this case refers to Khaziri, but he is not part of the Raether Group.

[5]This group appealed No. 98-56365 and consists of BASSAM D. HINDI; BEHROUZ SHIRDEL; MOHAMAD SHIRDEL; CARPINTERIA CAR CARE, INC.; CHI TAI; DANIEL LEE O'NEAL; DANIEL W. LENTZ; FAYE FOUAD; RAY FOUAD; FRANK E. JAKEL; GREGORY MESNA; GWENDOLYN MESNA; HARRY PERRY; HAYK BAZIK; HOVICK G. SADEGHI; JAVAD HAGHI (or HEIGH); JOHN OTTE; MAURO ANTENNCEI; ONNIK NICK MATHEVOSSIAN; PAUL A. HILLES; SAID SAIDATI; SALIM JAVAHIERI; TRACY FINNEL: VAN DUONG; BRADLEY DeBOER; EMRY BROTHERS INVESTMENTS, a general partnership; DENNIS AZZARELLO; VAHANEK KUPELIAN; M&K ENTERPRISES, INC., a California Corporation; STEPHEN NG; COUNTRY CLUB UNION, INC.; JOHN HIFAI; PATRICIA HILLES; SAEID SABOUR; TOMMY GENDAL.

that Union Oil and Tosco properly adhered to the PMPA regarding withdrawal from the market, despite the Hindi Group's claims that they violated the franchise termination and transfer provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). We affirm.

BACKGROUND

Unocal Corporation had established its wholly owned subsidiary, Union Oil, to conduct its petroleum refining, transportation, and marketing business. In 1994, Union Oil established a business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

For several years, Unocal gave consideration to various ways of restructuring the 76 Products operations, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during this period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996 began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated. but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow to stand alone.

Discussions with Tosco continued, and by late October, Tosco and Unocal were in active negotiations over 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996. and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval oil Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The management committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market withdrawal" by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obliged to offer each Union Oil franchisee a nondiscriminatory, three-year Tosco franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination and nonrenewal of their franchises, effective June 30, 1997, and also notified the Governors of the affected states of its market withdrawal.

By April 15, 1997, Tosco offered franchises, which were to become effective July 1, 1997, to the Union Oil franchis-

ees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees. However, an addendum to the Franchise Agreements noted that '[f]or off-balance sheet financing purposes," fee title to some of the franchise premises would be held by Clover Trust, which would purchase the property by taking a loan secured by a deed of trust, take fee title to it, and then lease it to T Northwest Properties II, Inc. ("Northwest"), a wholly owned subsidiary of Tosco. The franchisee's lease from Tosco was said to be "SUBJECT TO AND SUBORDINATE TO the lease with Clover Trust and deed of trust," (capitalization in original). Tosco reserved the right to terminate a franchisee's lease upon any termination or expiration of the Clover Trust lease, and Clover Trust could terminate a franchisee's lease upon any termination of the Clover Trust lease. If the Clover Trust lease were to terminate before the Franchise Agreement terminated, the addendum stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

Clover Trust is a Special Purpose Entity created to facilitate a "synthetic leasing" arrangement used by Tosco to finance a portion of the purchase from Union Oil. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took title to

the properties in trust for SBCC, and then entered into a short-term lease with Tosco's subsidiary, Northwest. SBCC agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring the property via a fixed formula at the end of the lease. If it does not acquire the property at the end of the lease, 20 to 25 percent of the original loan will no longer be its obligation. That means that it must pay 75 to 80 percent of the loan's value even if it does not take title to the premises. Tosco intended that the transaction with Clover Trust be treated as a secured loan for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco and Northwest assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes of ownership. Tosco and Northwest have all responsibility to insure and maintain the properties, must keep them free of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a definite price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with environmental laws.

Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a number of the California franchisees, many of whom asserted a desire to purchase the premises on which they were operating. Those ultimately led to these actions.

Unocal and Union Oil filed suit against the Kaabipour Group and, ultimately, the Raether Group, seeking a declaratory injunction that the withdrawal from the sale of motor fuels in California and the sale of all of the marketing assets to Tosco did not violate the PMPA. The Kaabipour Group

counterclaimed for declaratory relief and injunctive relief under California Business & Professions Code § 20999.25(a), seeking a right of first refusal on the transfer of the station premises to Tosco by Union Oil. The Kaabipour Group moved for summary judgment on the counterclaim; the district court denied summary judgment and then dismissed the counterclaim, holding that § 20999.25(a) was in conflict with the PMPA and was thus preempted. The Kaabipour Group appealed. Litigation involving the Raether Group continued for several months more. Unocal, Union Oil and Tosco moved for summary judgment on March 20, 1998, and the district court granted their motion. The Raether Group then appealed.

The Simmons Group filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into and renewing franchise agreements after it had decided to withdraw from the market, and by selling the Kasbarian premises to Clover Trust and SBCC, non-franchisors, without first offering, Kasbarian a sale or right of first refusal. It also alleged that Tosco violated the PMPA because it failed to offer nondiscriminatory franchises. The district court granted summary judgment against the Group and it appealed.

The Hindi Group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA (and Cal. Bus. & Prof. Code § 20999.25(a)) by selling the premises to Clover Trust and SBCC, non-franchisors, without first offering a sale or right of first refusal to the franchisees. The district court granted summary judgment against the Group and it, too, appealed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review "a grant of summary judgment de novo and must determine whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact." *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). We also review "[t]he district court's order granting [a] motion to dismiss for failure to state a claim Under Fed. R. Civ. P. 12(b)(6)" de novo. *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1295 (9th Cir. 1998).

DISCUSSION

As we have already pointed out, the major issues in these matters revolve around the requirements of the PMPA. We will consider the PMPA congeries of issues in this opinion.

The PMPA was designed to offer additional protection to petroleum products franchisees because it was felt that the large oil company franchisors had excessive bargaining power and that "remedying the disparity in bargaining power between franchisors and franchisees" provided a need for the legislation. S.Rep. No. 95-731. at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was '[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate

changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.*

The courts of appeals have recognized these competing interests. As we, and others, have said, the "overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship." *Ellis v. Mobil Oil,* 969 F.2d 784, 788 (9th Cir. 1992) (internal quotations and citation omitted); *see also May-Som Gulf, Inc. v. Chevron U.S.A., Inc.,* 869 F.2d 917, 921 (6th Cir. 1989). But that does not mean that courts have ignored the other purposes. "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf,* 869 F.2d at 921. " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

[1] In so stating, we do not mean to indicate that perusal of the words of the statute should be deferred while we dig about in legislative history and the like. However, arguments which depend on the notion that the PMPA in a one-way statute, which should single-mindedly be construed to favor franchisee positions, are rooted in sterile ground. That said, it is important to set forth the words of the statute itself, as relevant here, because those form the backdrop against which the PMPA issues before us must be scrutinized. The statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if —

> (i) such determination —
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and
>
> (iii) in the case of leased marketing premises —
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> . . .
>
> (II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E). With that in hand, we will turn to the specific issues in this case.

A. *The Timing of The Withdrawal*

The Simmons Group and the Raether Group claim that Union Oil violated the PMPA because it decided on withdrawal before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). We disagree.

[2] In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(1), Union Oil's decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed.

The latest franchise renewal was October 1, 1996. The district court ruled that the withdrawal determination had been made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. We agree. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(1).

[3] Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som Gulf,* 869 F.2d at 919, 927 (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.,* 933 F.Supp. 52, 59 (D.D.C. 1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the district court noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts had preceded the eventual deal with Tosco, and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

[4] By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that was a sale to Tosco negotiated and an even semisolid decision to withdraw reached. Therefore,

15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf,* 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

B. *The Transfer of The Premises; The Synthetic Lease*

The Simmons Group, the Raether Group and the Hindi Group all claim that Union Oil violated the PMPA because the premises of one or more members of their groups were not transferred to Tosco itself, but were transferred to the Clover Trust. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The claim of the Raether Group can be rejected at once because none of its members held premises which were transferred to the Clover Trust. The other two groups are a different matter, and their claims must be resolved on the merits, but we are satisfied that the district court did not err.

[5] When a franchisor terminates or nonrenews existing franchises or franchise relationships[6] as part of a market withdrawal, § 2802(b)(2)(E)(iii) provides that the franchisor can either (I) grant the franchisee a chance to match a bona fide offer to purchase the premises or

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[6]The term "franchise" includes "the contracts or agreements that provide for the franchisee's use of a franchisor's trademark, the lease of a service station, and the motor fuel supply contract." *Han v. Mobil Oil Corp.,* 73 F.3d 872, 876 (9th Cir. 1995); 15 U.S.C. § 2801(1). "The 'franchise relationship' is comprised of the respective obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise." *Han,* 73 F.3d at 876; 15 U.S.C. § 2801(2). The "franchise relationship" is "an entity separate from, but defined by, the 'franchise,' or contractual arrangement existing between the parties." *Han,* 73 F.3d at 876. The term "franchise relationship" reaches situations where the franchise contract may no longer exist. "The 'franchise relationship' term assures that the parties understand that even though the contract is no longer in effect, the PMPA still will protect a viable relationship between the parties." *Id.* at 876 n.3.

(II) sell, assign, or transfer the franchisor's interest in the premises to another person who will offer a nondiscriminatory franchise to the franchisee. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis,* 969 F.2d at 788. The franchisees argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of title to the premises, is not a franchisor[7] capable of offering nondiscriminatory franchises to the former Union Oil franchisees. That argument is far too simplistic.

[6] All agree that Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales. It has not even entered into any contractual relationship with the franchisees. That, however, does not mean that the requirements of subsection II have not been met, and that subsection I should have been applied. As Union Oil and Tosco point out, the synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II because Clover Trust is part of a special purpose financing arrangement whereby Tosco, in effect, purchased the property, and Tosco was capable of offering nondiscriminatory franchises to the former Union Oil franchisees.

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[7]The PMPA defines "franchisor" as "a refiner or distributor . . . who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801(3). A "franchise" is a contract "under which a refiner or distributor . . . authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use." 15 U.S.C. § 2801(1)(A).

[7] Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. It is true that the terms of the PMPA are to be liberally construed to protect the franchisees. *See Humboldt Oil Co., Inc. v. Exxon Co.,* 695 F.2d 386, 389 (9th Cir. 1982). On the other hand, the use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, as we have already noted, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf,* 869 F.2d at 921; *Valentine v. Mobil Oil Corp.,* 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of 76 Products, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises. If, as appears here, the particular details of the financing of the sale transaction had no untoward impact on the interests of the franchisees, there is no reason to find a PMPA violation.

[8] The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.,* 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises was always quite real. Indeed, general law treats synthetic lease arrangements as transparent for tax and

other purposes.[8] The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by virtually all concerned, including the government, as a secured loan.

[9] Despite the fact that a synthetic lease arrangement could formalistically be parsed into individual arrangements which would include a purchase by Clover Trust for the benefit of SBCC with a lease to Tosco, we need not, and do not, ignore the fact that the cumulative arrangements re-

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[8]We refer, of course, to a transaction which is structured as the financing device often called a synthetic lease. *See* John C. Murray, *Off-Balance-Sheet Financing: Synthetic Leases,* 32 Real Prop. Prob. & Tr. J. 193, 195-200 (1997); Andrew Rater, *Synthetic Leasing: Too Good to be Ignored; Real Estate Financing,* National Real Estate Investor, August 1996, at 104. While the arrangement is treated as an operating lease for accounting purposes under Generally Accepted Accounting Principles, a synthetic lease is viewed as a secured loan by the IRS for tax purposes. *See Murray, supra* at 196-97; *Ratner, supra* at 104; *cf.* Tech. Adv. Mem. 98-02-002 (Jan. 9, 1998); Rev. Proc. 75-21, 1975-1 C.B. 715; Rev. Proc. 75-28, 1975-1 C.B. 752; Rev. Proc. 76-30. 1976-2 C.B. 647. It is treated as a security instrument for both UCC and real property financing purposes. See William D. Egler, *Financing Structures: A Primer of Synthetic Lease Transactions,* Equipment Leasing, June 1997, at 5. And, in the area of bankruptcy, courts have also looked through other kinds of lease arrangements to the underlying "federal law purposes" and "economic realities" of those arrangements. *See Moreggia & Sons, Inc. v. Walsh (In re Moreggia & Sons, Inc.),* 852 F.2d 1179, 1182 (9th Cir. 1988) (applying 11 U.S.C. § 365); *see also Liona Corp. N.V. v. PCH Assocs. (In re PCH Assocs.),* 804 F.2d 193, 201 (2d Cir. 1986) (though transaction was labeled a sale and leaseback, its true nature was that of a joint venture and therefore no landlord-tenant relationship existed under § 365); *In re Independence Village,* 52 B.R. 715, 718-20 (Bankr. E.D.Mich.1985) (the intentions of the parties to the transaction and the economic substance of the transaction, rather than who holds legal title, determinative under § 365); *see also Murray, supra* at 204-208, 217-222 (bankruptcy issues discussed, treatment not entirely clear). There is no contention that the transaction here was not a synthetic lease. Of course, some care is needed in the use of the phrase, for it is the structure, not the phrase, that is important.

sulted in a single transaction whereby Tosco took over the ownership role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens.

[10] In addition, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. Tosco could breach its contract, default, and lose the property. But the PMPA does not require us to assume that it will, and it is more reasonable to assume, instead, that "[t]hings happen according to the ordinary course of nature and the ordinary habits of life." Cal. Civ. Code § 3546. Barring financial collapse, it is highly unlikely that Tosco will forego its option to purchase at the end of the synthetic lease term because the effective financial penalties would be very steep. From Tosco's standpoint, its acquisition of fee title is, as it puts it, "a forgone conclusion."

[11] Moreover, the franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where

they reasonably could have expected to be under the franchise agreements they made as retailers of 76 Products had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship that they bargained for.

The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. Subsection II was not violated by its use.

C. *The Franchise Offers*

The Simmons Group and the Raether Group claim that Union Oil violated the PMPA because Tosco did not make a nondiscriminatory offer of new franchises to them. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). Again, we disagree.

Section 2802(b)(2)(E)(iii)(II) allows a franchisor making a market withdrawal to sell, assign, or transfer the premises and the franchise to another franchisor who will offer a nondiscriminatory franchise to the franchisee. Again, subsection II requires the old and new franchisors to act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis,* 969 F.2d at 788.

[12] Pursuant to the requirements of the PMPA, a franchisor may sell its franchise to another franchisor so long as the purchasing party "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at

different franchise locations." *Ewing v. Amoco Oil Co.,* 823 F.2d 1432, 1438 (10th Cir. 1987). "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.,* 725 F.Supp. 1104, 1109 (D.Nev. 1989); *see also Avramidis v. Arco Petroleum Prods. Co.,* 798 F.2d 12, 13-14 (1st Cir. 1986).

[13] The "good faith" requirement looks to whether the franchisor's actions are designed to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers,* 725 F.Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id., citing Siecko v. Amerada Hess Corp.,* 569 F.Supp. 768, 772 (E.D.Pa. 1983). In the context of grounds for nonrenewal under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in "judicial second-guessing of 'the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith.' " *Valentine,* 789 F.2d at 1392 (citation omitted).

Neither Group disputes that the franchise agreements offered by Tosco were essentially the same for each of their members, or that they mirrored those which the franchisees had with Union Oil. They claim, however, that the PMPA requires that the franchises Tosco offered to the former Union Oil franchisees be compared to the "franchises . . . in effect and with respect to which [Tosco] is the franchisor," which means, they argue, that the new "76" franchise agreements must be compared to Tosco's existing franchise agreements. Specifically these California franchisees seek to be compared with Tosco's BP franchisees, all of whom are

outside of California. The district court did not resolve the comparison issue, but concluded that, even if the "76" franchise agreements were compared to the BP agreements, the differences between them would not amount to discrimination against the "76" franchisees. We agree with that approach and limit our consideration accordingly.

[14] The sole salient difference between the franchise agreements that the franchisees address in this appeal is the provision for a yearly increase in rent in the "76" agreements, while the BP agreements have a fixed rent throughout the lease term. The franchisees offer no evidence of discriminatory motive in this difference, pointing only to the fact that Tosco reviewed its BP franchise agreements when deciding what agreements to offer its new "76" franchisees. They portentously observe that this means the different rent provisions cannot be dismissed as a mistake or accident, and assert that "[t]his is compelling evidence of bad faith." Of course, the mere fact that a decision was intentional does not evidence bad faith. All the more so here, where what Tosco decided to do was offer its new franchisees precisely the agreement terms they were accustomed to, rather than alter them. Indeed, it is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of 76 Products. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers,* 725 F.Supp. at 1109. Especially is that true where, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

Because the franchisees have not demonstrated any lack of good faith in Tosco's offer of franchises to them, and

cannot show that they have been treated in a discriminatory fashion, the district court did not err.

D. *Preemption of California Law*

The Kaabipour Group asserts that California law applies to this market withdrawal and, as a result, Union Oil was required to offer its members the right to purchase their premises before they were transferred to Tosco. *See* Cal. Bus. & Prof. Code § 20999.25(a).[9] In a related claim, the Hindi Group asserts that because its members' franchises did not terminate at the exact time that the transfer to Tosco became effective, California law applies. The district court held that California law was preempted to the extent that it attempted to add terms and conditions to the market withdrawal by Union Oil beyond those required by the PMPA itself. We agree with the result reached by district court.

[15] "In enacting the PMPA, Congress attempted to provide national uniformity of petroleum franchise termination law." *Atlantic Richfield Co. v. Herbert (In re Herbert)*, 806 F.2d 889, 892 (9th Cir. 1986). That uniformity "would be frustrated" if the PMPA did not preempt "all inconsistent state law." *Id.* Section 2806(a) of Title 15 provides for preemption of all state law with respect to termination of a petroleum franchise which is inconsistent with the PMPA.

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[9]The section reads:

> In the case of leased marketing premises as to which the franchisor owns a fee interest, the franchisor shall not sell, transfer, or assign to another person the franchisor's interest in the premises unless the franchisor has first either made a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interest in the premises, other than signs displaying the franchisor's insignia and any other trademarked, servicemarked, copyrighted or patented items of the franchisor, or if applicable. offered to the franchisee a right of first refusal of any bona fide offer acceptable to the franchisor made by another to purchase the franchisor's interest in the premises.

[16] The preemptive scope of the PMPA *is* limited; it does not reach any state laws which only incidentally affect franchise termination or nonrenewal. *See Pride v. Exxon Corp.*, 911 F.2d 251, 257-58 (9th Cir. 1990) (finding that state law regarding fraud in the formation of contracts was not preempted by the PMPA because it did "not implicate the grounds for, procedures for or notification requirements of termination and nonrenewal under the [PMPA]"); *see also Esso Standard Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 431, 434 (1st Cir. 1986) (restrictive view of PMPA preemption); *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, 304 (2d Cir. 1986) (same); *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 592-93 (3d Cir. 1989) (same); *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907, 915 (6th Cir. 1986) (same). *But see Jimenez*, 853 F.2d at 272-74 (expansive view of PMPA preemption, rejecting *Bellmore*); *Continental Enters., Inc. v. American Oil Co.*,808 F.2d 24. 27-28 (8th Cir. 1986) (same, rejecting *Esso Standard Oil Co.*). *See also* Theresa L. Kruk, Annotation, *Pre-emptive Scope of § 106(a) of Petroleum Marketing Practices Act (15 U.S.C.A. § 2806(a))*, 103 ALR Fed. 698, 704-05 (1991). On its face, however, that offers little succor to these groups because this clearly was a market withdrawal by Union Oil and a termination of the franchises.

[17] California Business & Professions Code § 20999.25(a) "was prompted by a concern that major oil companies were reducing the number of independently-operated service stations in California." *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.*, 58 Cal.App.4th 1261, 1272, 68 Cal.Rptr.2d 532, 537 (1997). It parallels the PMPA in "seek[ing] to protect the franchisee's reasonable expectation of continuing its business while allowing the franchisor adequate flexibility to respond to changing market conditions." *Id.* at 1273, 68 Cal.Rptr.2d at 538.

[18] While § 20999.25 parallels the PMPA, it does not invade the PMPA sphere. In *Forty-Niner,* the court said, "[T]he PMPA covers franchise termination and nonrenewal while section 20999.25(a)'s scope encompasses a situation where the franchisor is going to sell the service station premises but will assign rather than end the franchise arrangement." *Id.* at 1276-77, 68 Cal.Rptr. at 540. It noted that "[t]he sponsor of [section 20999.25(a)], . . . states that the bill is intended to address circumstances not covered under the [PMPA]." *Id.* at 1275, 68 Cal.Rptr.2d at 539 (internal quotation marks and citations omitted). It concluded that "[s]ection 20999.25(a) is not designed to cover franchise termination or nonrenewal in a way different than the PMPA," and "must be construed to be the same as the PMPA with respect to franchise termination or nonrenewal." *Id.* and n.6.

The franchisor in *Forty-Niner,* which was also Union Oil, had sold truck stop properties it had leased to franchisees to a third party, but had assigned the franchise agreements to that third party rather than terminate or nonrenew them. Because there was no termination or nonrenewal, the PMPA was not implicated. The court concluded that "[t]he PMPA and section 20999.25(a) occupy different spheres." *Id.* at 1276, 68 Cal.Rptr.2d at 539-40. "[S]ection 20999.25(a) facilitates the purchase of the service station by the franchisee leasing and operating it *(outside the PMPA context of termination or nonrenewal).*"[10] *Id.* at 1274, 68 Cal.Rptr.2d at 538 (emphasis added). Thus, it fills gaps

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[10]The court repeated this point in holding that the section was not an unconstitutional taking of the property right to sell a right of first refusal. The court held that "section 20999.25(a) substantially advances a legitimate state interest" because "[i]t facilitates the purchase of retail service stations by their independent lessee-franchisees *in contexts outside franchise termination and nonrenewal,* thereby ensuring the motoring public greater access to service stations and furthering a more dynamic and full-service oriented (tires, batteries, tune-ups, etc.) retail-

not covered by the PMPA. *See, e.g., Patel v. Sun Co., Inc.*, 866 F.Supp. 871, 873 (E.D.Pa. 1994) (where franchise rights were not sold, assigned, or otherwise affected, despite sale of premises, the franchisees' requests for injunctive relief and damages under the PMPA were denied, because the PMPA is not addressed to situations not involving termination or nonrenewal), *aff'd on other grounds,* 63 F.3d 248 (3d Cir. 1995). In other words, the statutes are not really in conflict, and the PMPA controls in a termination or nonrenewal case.

We much prefer that reading of the statutes. It accords with the respectful approach of generally interpreting and applying legislation by harmonizing state and federal statutes where possible so as to avoid finding preemption. *See California ARCO Distribs., Inc. v. Atlantic Richfield Co., 158* Cal.App.3d 349, 359, 204 Cal.Rptr. 743, 750 (1984) ("State and federal laws should be accommodated and harmonized where possible so that preemption can be avoided."); *see also Committee of Dental Amalgam Mfrs. and Distribs. v. Stratton,* 92 F.3d 807, 811 (9th Cir. 1996) (strong presumption against finding that state law is preempted by federal law)."[11]

[19] In this case, Union Oil was expressly engineering a market withdrawal involving the termination of franchise agreements, and was selling its franchise business and the

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ing atmosphere." *Forty-Niner.* 58 Cal.App.4th at 1273, 68 Cal.Rptr.2d at 538 (emphasis added).

[11] Were it necessary to find a clash between § 20999.25 and the PMPA, we have little doubt that the terms of the PMPA must prevail when, as here, the franchises are being nonrenewed and terminated. *See Pride,* 911 F.2d at 258; *Humboldt Oil.* 823 F.2d at 374; *In re Herbert,* 806 F.2d at 892; *see also Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995); *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Again, however, we need not decide that question here.

premises. Thus, because the federal and state provisions "occupy different spheres," *Forty-Niner,* 58 Cal.App.4th at 1276, 68 Cal.Rptr.2d at 539-40, and this case is *within* the context of franchise termination or nonrenewal, the federal provision controls.

The Hindi Group attempts to avoid this result by asserting that California law applies because this really was not a nonrenewal or termination situation. Considering the fact that Union Oil did give notice of both nonrenewal and termination, together with the fact that Tosco did offer a new franchise agreement, that is a rather surprising argument. Like other group arguments in this case, it is based on a transaction technicality.

Union Oil notified the franchisees on December 26, 1996, that their franchises would be nonrenewed or terminated effective June 30, 1997. In the meantime, the sale to Tosco closed March 31, 1997, and Tosco offered new franchise agreements, which were to be effective July 1, 1997. During the period from March 1, 1997 to July 1, 1997, the franchisees were operating under their old franchise agreements. Thus, the Hindi Group argues, there was no PMPA termination at all.

[20] The argument is not without a degree of elegance, but it is a grasp at a straw. The PMPA does not state that in a complex transfer situation everything must happen on one day. It merely provides that a franchisor may terminate or fail to renew a franchise, if it is withdrawing from the market, transfers the premises to a new franchisor, and the new franchisor makes a proper offer of a new franchise. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). That is precisely what occurred here.

[21] As Tosco points out, it had to own the property before it could offer new franchises at those sites, which would not be subject to contingencies inherent in closing the

sale. The approach used also gave the franchisees enough time to consider the new franchise agreements. Nothing argued by the franchisees suggests any defect in those considerations. Moreover, Tosco asserts, "[t]his timing mechanism is a procedure generally utilized in market withdrawals where a new franchise will be offered to the franchisees by the purchasing franchisor." That assertion appears plausible, and is not refuted by the franchisees. We accept it.

The PMPA neither states nor implies that a complex transaction should be evaluated by parsing it moment by moment into each discrete component, rather than considering it as a single transaction. To so parse it would be particularly undesirable where, as here, the arrangement is consistent with the PMPA's purpose of stabilizing continuing franchise relationships, rather than causing discontinuities in the motor fuel marketing area. The Hindi Group's argument implies that if land is transferred a day before the franchise ends, state law applies, and if it transfers the day after the franchise ends, the PMPA is violated. Neither of those implications holds water. Rather, Union Oil and Tosco did comply with both the letter and the spirit of the PMPA when the former chose to withdraw from the market. The straw will not keep this claim afloat.

CONCLUSION

The various groups of franchisees who have appealed these cases seem to look upon the PMPA as if it were merely a rigid mathematical formula, which must be followed with precision if the correct answer is to be obtained. It is not. In fact, in enacting the PMPA Congress used language which is quite fluid. While the substance of the provisions must be followed, no particular set of facts constitutes the sole means of meeting those substantive requirements. Recognizing that, we hold that the substance

of the requirement that the franchisor's interest in the marketing premises be transferred to a person who will offer a new franchise to the franchisee is simply that both the franchise and the interest in the premises come under the control of the new franchiser — here Tosco. An allotrope of that substance would be the rather traditional purchase with financing secured by the transferred property. The synthetic lease method used here is simply another allotrope. In short, the PMPA was complied with because the substance remained the same. Similarly, the substance of the PMPA was followed when Tosco offered the new franchises to the old Union Oil franchisees. Moreover, Union Oil did not violate the PMPA's timing provisions in any respect, and California law did not apply to this market withdrawal.

AFFIRMED.

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APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BASSAM D. HINDI; BEHROUZ SHIRDEL; MOHAMAD SHIRDEL; CARPINTERIA CAR CARE, INC.; CHI TAI; DANIEL LEE O'NEAL; DANIEL W. LENTZ; FAYE FOUAD; FRANK E. JAKEL; GREGORY MESNA; GWENDOLYN MESNA; HARRY PERRY; HAYK BAZIK; HOVICK G. SADEGHI; JAVAD HAGHI; JOHN OTTE; MAURO ANTENNCEI; ONNIK NICK MATHEVOSSIAN; PAUL A. HILLES; SAID SAIDATI; SALIM JAVAHIERI; TRACY FINNEL; VAN DUONG; BRADLEY DEBOER; EMRY BROTHERS INVESTMENTS, a general partnership; DENNIS AZZARELLO; VAHANEK KUPELIAN; M&K ENTERPRISES, INC., a California Corporation; STEPHEN NG; COUNTRY CLUB UNION, INC.; JOHN HIFAI; PATRICIA HILLES; SAEID SABOUR; TOMMY GENDAL,

Plaintiffs-Appellants,

v.

TOSCO CORPORATION; T NORTHWEST PROPERTIES II, INC.; CLOVER TRUST 1997-1, A DELAWARE Business Trust; UNION OIL COMPANY OF CALIFORNIA, a California corporation,

Defendants-Appellees.

No. 98-56365
D.C. No.
CV-97-6388-ABC
ORDER

Before: D.W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Appellants' motion for order permitting oversized petition for rehearing is GRANTED. The petition for rehearing is DENIED.

Nos. 99-446, 99-551

IN THE

Supreme Court of the United States

BASSAM HINDI, *et al.*,

Petitioners,

v.

TOSCO CORPORATION, *et al.*,

Respondents.

-and-

CHARLES SIMMONS, *et al.*,

Petitioners,

v.

UNOCAL CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY SIMMONS AND HINDI PETITIONS

1. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that Tosco's acquisition of Union Oil Company of California's ("Union Oil") west coast assets pursuant to Union Oil's withdrawal from the geographic market did not violate the timing and "discrimination" provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-6 ("PMPA").

2. As to the Petitions filed by the Simmons and Hindi groups, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the decision by Tosco Corporation to utilize synthetic leasing to finance a portion of the assets acquired from Union Oil did not contravene the PMPA.

3. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the Simmons group did not possess antitrust standing and had not suffered antitrust injury arising from Tosco's acquisition of Union Oil's west coast assets.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of Court, Respondents state as follows:

Tosco Corporation, T Northwest Properties II, Inc., and Clover Trust 1997-1, state that Tosco Corporation and Clover Trust 1997-1 do not have any parent corporations. T Northwest Properties II, Inc. is a wholly owned subsidiary of Tosco Corporation.

Union Oil is a wholly-owned subsidiary of Unocal Corporation.

There is no publicly held company that owns 10% or more of the stock of any Respondent.

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STATEMENT

1. Union Oil withdrew from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In doing so, Union Oil sold its marketing assets to Tosco. A number of former Union Oil franchisees objected to the sale on various grounds mostly arising out of the PMPA. In separate rulings, the district court ruled against all of them. Four groups of plaintiffs appealed to the Ninth Circuit Court of Appeals. Of the four groups, only two — the Hindi and Simmons groups — filed Petitions for a Writ of Certiorari. Respondents address both Petitions in this brief.

2. Unocal conducted its petroleum refining, transportation, and marketing business by and through its wholly owned subsidiary, Union Oil. In 1994, Union Oil established a separate unincorporated business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

3. For several years, Unocal gave consideration to various ways of restructuring 76 Products, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during the period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996, began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans

continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated, but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow as a stand alone business.

4. Discussions with Tosco continued, and by late October Tosco and Unocal were in active negotiations over a possible acquisition of 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996, and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval of Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The Management Committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

5. The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market

withdrawal" as defined under the PMPA by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obligated to offer each Union Oil franchisee a nondiscriminatory, three-year petroleum marketing franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination or nonrenewal of their franchises, effective June 30, 1997, and, as required under the PMPA, Union Oil also notified the Governors of the affected states of its market withdrawal.

6. By April 15, 1997, Tosco offered petroleum marketing franchises, which were to become effective July 1, 1997, to the Union Oil franchisees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees.

7. Tosco financed a portion of the acquisition through a secured financing vehicle known as synthetic leasing. None of the facts pertaining to Tosco's synthetic lease financing were disputed before the district court or the court of appeals. A synthetic lease is a financing arrangement first developed in the late 1980s and has become a commonly used means for publicly traded companies to finance asset acquisitions.

8. The synthetic lease is a form of financing structured to meet the Generally Accepted Accounting Principles ("GAAP") definition of an operating lease for accounting purposes, which gives the company off-balance sheet accounting treatment. At the same time, based on its attributes, the synthetic lease is viewed as a secured loan by the company for legal and tax purposes, since the company retains the risks and benefits of ownership of the assets being

financed. This financial structure is efficient because it provides low cost financing and is treated as an operating lease for book purposes. Therefore, neither the asset being financed nor the corresponding debt are reflected on the company's balance sheet, resulting in more competitive financial ratios, as is done by many of Tosco's competitors. (While the assets being financed and the corresponding liabilities do not appear in the financial statements, they are fully discussed in the Notes To Consolidated Financial Statements that are published with the financial statements.)

9. In the basic synthetic lease structure, a special purpose entity ("SPE") is formed to receive the loan from the lending institution, transmit the loan proceeds to the seller and acquire bare legal title to the properties. The SPE, here Respondent Clover Trust, is not an operating entity. The acquiring company or its subsidiary then enters into a short-term lease agreement with the SPE (with the SPE as lessor) with an option for the acquiring company to obtain title to the properties for a fixed price or pursuant to a fixed formula.

10. The acquiring company, here Tosco, assumes all operational and casualty risks of the properties and takes full responsibility for operating, maintaining and managing the assets. Because of these features, the lease appears and functions like a medium-term, revolving credit arrangement rather than a typical lease, with all the protections for the lessor in place that would apply in the case of a normal, medium-term, secured commercial loan to a company with a high credit rating.

11. Tax and bankruptcy authorities consider synthetic leases to be financing transactions, based primarily on factors such as the intent of the parties, the relatively small equity

investment by the SPE, the option to purchase the asset by the company at a later date, and the fact that all of the burdens, risks, rewards and responsibilities for the asset associated with ownership reside with the acquiring company (Tosco), which will enjoy any appreciation in the value of the property and bears the risk of asset depreciation. The Internal Revenue Service treats the transaction as a secured financing, viewing the company as the beneficial owner of the assets. The bankruptcy courts take the same approach, determining, based on the intent of the parties and the economic substance of the transaction, that the transaction should be treated as a financing arrangement.

12. Clover Trust was formed as the SPE to facilitate the "synthetic leasing" arrangement used by Tosco to finance a position of the purchase. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took legal title to the properties and then entered into a short-term lease with Tosco's subsidiary, Northwest. Clover Trust agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring legal title via a fixed formula at the end of the lease. If it does not acquire title at the end of the lease, Tosco must still pay 75 to 80 percent of the loan's value, making acquisition of title a foregone conclusion. Tosco and Clover Trust intended that the transaction be treated as a secured loan to Tosco for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes and burdens of ownership. Tosco has all responsibility to insure and maintain the properties,

must keep them free of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a specified price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with the environmental laws.

13. If the Clover Trust lease were to terminate before any franchise agreement terminated, an addendum sent to the franchisees stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

14. Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a small percentage of the California franchisees whom asserted a desire to purchase the premises on which they were operating.

15. The Simmons group filed a complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into

and renewing franchise agreements after it had decided to withdraw from the market, and by utilizing the synthetic lease financing. It also alleged that Tosco violated the PMPA because it purportedly failed to offer non-discriminatory franchises. The district court granted summary judgment against the group and it appealed to the Ninth Circuit.

16. The Hindi group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA by utilizing synthetic lease financing. The district court granted summary judgment against the group and it, too, appealed.

17. On May 19, 1999, the court of appeals affirmed the district court's grants of summary judgment in total. The court of appeals published an opinion addressing the PMPA issues, which were asserted by the four groups of plaintiffs. The court addressed the Simmons group's antitrust claims and a discovery issue raised by that group in an unpublished memorandum opinion.

18. As to the PMPA arguments, the court of appeals followed unanimous precedent in holding that Union Oil did not violate any timing requirements in connection with its withdrawal, as it did not determine to withdraw from the market until its Board of Directors approved a resolution authorizing Union Oil to enter into an agreement with Tosco. The court of appeals also found unpersuasive the contention that Tosco's decision to utilize synthetic leasing to finance a portion of the transaction violated section 2802(b)(2)(E)(iii)(II) ("subsection II") of the PMPA, stating

> [n]othing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements.

Finally, the court of appeals concluded that Tosco's franchise offers, which were identical as to all the Union Oil franchisees and essentially mirrored their former franchise agreements with Union Oil, were not discriminatory.

19. As to the Simmons group's antitrust claims, the court of appeals affirmed the district court's grant of summary judgment, holding that the appellants' claimed injuries — the alleged loss of the opportunity to buy the service stations they operate and the possibility of increased wholesale prices from their own franchisor — were unfounded, constituting "rank speculation".

20. The Simmons group filed a Petition with this Court, asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). The Simmons group further contends that the district court and court of appeals erred in concluding that petitioners did not suffer an antitrust injury and lacked antitrust standing.

21. The Hindi group filed a separate Petition asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the PMPA. Respondents address both Petitions in this consolidated brief.

ARGUMENT

The court of appeals correctly held that that Union Oil and Tosco properly adhered to the provisions of the PMPA with respect to: (1) the timing of the transaction; (2) the synthetic leasing financing mechanism chosen by Tosco; and (3) the offer of non-discriminatory franchises. The court's decision does not conflict with any decision of this Court or any decision rendered by the other circuits. Similarly, the court's ruling that the Simmons group did not suffer antitrust injury and lacked antitrust standing is fully consistent with the decisions of this Court and the other circuits. The Simmons Petition fails to cite any circuit decision or decision by this Court granting standing to franchisees in the context of a sale which, to the franchisees, merely has the effect of replacing one franchisor with another. None of these determinations warrants further review.

A. The PMPA Balances The Interests Of Franchisors and Franchisees

The PMPA was designed to offer additional protection to petroleum products franchisees from arbitrary or discriminatory termination of their franchise agreements or non-renewal of the franchise relationship. S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was "[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance

of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf, Inc. v. Chevron USA, Inc.*, 869 F.2d 917, 919, 921 (6th Cir. 1989). " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

In the context of a market withdrawal, the statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if —
>
> (i) such determination —
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and

(iii) in the case of leased marketing premises —

. . .

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E).

Respondents turn to the specific issues in this case.

B. The Timing of the Withdrawal Did Not Violate the PMPA

The Simmons group argues that Union Oil violated the PMPA because it engaged in preliminary discussions about possible withdrawal options before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). Following unanimous

precedent, the court of appeals correctly found this argument unpersuasive. The Simmons petitioners cite no case supporting their position.

In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(I), Union Oil's actual decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed. The latest franchise renewal was October 1, 1996. The district court and court of appeals both ruled that the withdrawal determination was made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I).

In so ruling, the lower courts followed unanimous precedent. Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som,* 869 F.2d 917, 919, 927 (6th Cir. 1989) (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.,* 933 F. Supp. 52, 59 (D.D.C. 1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the court of appeals noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts

had preceded the eventual deal with Tosco, and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that date was the sale to Tosco negotiated and a decision to withdraw reached. Therefore, 15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf*, 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

The Simmons Petition fails to cite any decision that has held to the contrary. No further review is warranted.

C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA

Petitioners also claim a violation of the PMPA because Tosco chose to utilize synthetic leasing as a means to finance its acquisition of a portion of the assets. The district court and court of appeals correctly determined that the PMPA does not prohibit financing techniques such as synthetic leasing, and that the franchisees were fully protected in the manner intended by the PMPA through the offer of new, non-discriminatory franchise agreements by Tosco that enabled the franchisees to continue operating their businesses in exactly the same manner as they had been doing before.

Petitioners do not point to any decision by this Court, or any decision by other circuit courts, holding synthetic leasing to be violative of the PMPA. Indeed, petitioners fail to cite any decision that has considered this truly arcane financing issue in the context of the PMPA. No further review is warranted.

When a franchisor terminates or nonrenews existing franchises or franchise relationships as part of a market withdrawal, section 2802(b)(2)(E)(iii) provides that the franchisor can either: (I) grant the franchisee a chance to match a bona fide offer to purchase the premises; or (II) sell, assign, or transfer the franchisor's interest to another person who will offer a non-discriminatory franchise to the franchisee.

Subsections (I) and (II) apply in different situations. Subsection (I) by its plain language contemplates a situation in which the withdrawing franchisor does *not* seek to sell the particular franchise as part of a transfer of its interest in multiple service stations to a new franchisor. *See, e.g., Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 15 at n.7 (1st Cir. 1986) ("Because Shell's purchase offer included some 400 Arco franchises, as well as numerous other assets, Subsection (E)(iii)(II) — requiring only that the purchasing franchisor offer the dealer a nondiscriminatory franchise — applied, rather than Subsection (E)(iii)(I) whose 'right of first refusal' provision contemplates the sale of a single franchise."). Recognizing that the franchisee should have greater rights in the service station property than a random buyer of the premises, the PMPA requires a franchisor who proceeds under this section to provide the franchisee the opportunity to purchase the premises so that the franchisee may continue its business in that location.

By contrast, Subsection (II) contemplates the situation when, as here, the withdrawing franchisor seeks to sell its interests in multiple service stations as a going concern to another franchisor. *See, e.g., Avramidis*, 798 F.2d at 15 n.7. Subsection (II) protects the franchisees from arbitrary or unfair treatment by the new franchisor by guaranteeing that the dealers will receive replacement franchises on fair terms, and thus can continue to remain in business at that location, as franchisees of the new franchisor. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992).

The Petitioners argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of legal title to the premises under the secured financing, is not a franchisor capable of offering nondiscriminatory franchises to the former Union Oil franchisees. The court of appeals correctly observed that this argument "is far too simplistic." That Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales, is legally irrelevant. The synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II, because Clover Trust is part of a special purpose financial arrangement whereby Tosco purchased the property, and Tosco was indeed capable of offering — and did offer — non-discriminatory franchises to the former Union Oil franchisees.

Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom

the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. The use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf*, 869 F.2d at 921; *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of the Union 76 brand, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises.

The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises is absolute and real. Indeed, general law treats synthetic lease arrangements as transparent for tax and other legal purposes. The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by all concerned, including the government, as a secured loan.[1]

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1. *See, e.g., Sun Oil Company v. Commissioner of Internal Revenue*, 562 F.2d 258 (3d Cir. 1977); Revenue Procedures 75-21, 75-28, 76-30; *Moreggia & Sons, Inc. v. Walsh*, 852 F.2d 1179 (9th Cir. 1988) (the test is the intent of the parties and the economic

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The contention by the Hindi petitioners that the court of appeals' opinion contradicts other circuit decisions is meritless. (Hindi Pet. at 15) None of the three cases cited by petitioners involved synthetic leasing or any other issue involving financing. *See Avramidis*, 798 F.2d 12 (1st Cir. 1986); *John & Kostas Service Station Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991); and *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987). The *Avramidis* matter involved issues relating to PMPA notice and discrimination; the *Kostas* matter involved whether the new franchisor offered discriminatory franchises; and the *Ewing* case also involved issues of discrimination by the new franchisor. Nothing about those cases even remotely suggests that the decision by the new franchisor to utilize synthetic leasing violates the PMPA.

The court of appeals correctly observed that the result of the individual arrangements was a single transaction whereby Tosco took over the ownership and franchise role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, as the court of appeals stated, "there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens."

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substance of the arrangement, not the locus of title). *See also In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986) (holding that the lease in a sale-leaseback financing transaction was not a "lease" for purposes of section 365, looking at the economic realities of the transaction); *In re Independence Village*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (the lease-purchase contract was determined, in substance, to be a security agreement giving the lessor an equitable mortgage in the real property; court based conclusion on its analysis of the intentions of the parties and the economic substance of the transaction).

Moreover, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. It is a foregone conclusion Tosco will acquire legal title at the end of the synthetic lease term because the effective financial penalties would be very steep.

The franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 brand motor fuel had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship for which they bargained. The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. The court of appeals did not err in concluding that Subsection II was not violated by its use.

D. Tosco's Franchise Offers Were Not Discriminatory

The Simmons group asserts that the court of appeals erred in holding that Tosco's offers of new franchises were not discriminatory. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The court of appeals did not err, and its ruling was consistent with the unanimous precedent. Indeed, Petitioners do not point to any decision holding to the contrary. No further review is warranted.

Under the PMPA, a franchisor may sell its franchise to another franchisor so long as the new franchisor "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person **or** franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). (Emphasis supplied) Each location has a unique set of considerations based, for example, on its particular competitive situation or the contract terms already in place for existing, similarly situated franchisees. By phrasing subsection (E)(iii)(II) in the disjunctive, Congress understood the importance of providing the franchisor with the business flexibility to provide a new franchisee with the offer of a franchise that is comparable either to the other new franchises being offered *or* to existing franchises that may be more relevantly situated.[2]

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2. For example, if the franchisor acquires additional franchises in the context of a market withdrawal, it may make business sense to offer leases to some of the new franchisees on terms that differ from each other but that mirror existing franchises in similar relevant circumstances (i.e., all service stations in XXXX County might be full-serve and operate 24 hours, which is expected by the residents

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The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at different franchise locations." *Ewing*, 823 F.2d at 1438. "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989); *see also Avramidis*, 798 F.2d at 13-14.

The "good faith" requirement looks to whether the franchisor's actions are intended to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers*, 725 F. Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id., citing Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 772 (E.D. Pa. 1983). In the context of grounds for nonrenewal under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in

> judicial second-guessing of "the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory *motive* or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith."

Valentine, 789 F.2d at 1392 (emphasis supplied).

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and necessary in order to be competitive). On the other hand, for legitimate business reasons, the franchisor may want to provide all of the new franchisees with agreements materially similar to each other but that differ in some respects from existing leases which may not be relevantly situated or which may contain outdated terms that will be revised upon expiration of the existing franchises.

The Simmons group does not dispute that the franchise agreements offered by Tosco were essentially the same for each of the former Union Oil franchisees or that they mirrored those which the franchisees had with Union Oil. Their sole argument that they were offered "discriminatory" franchises is that Tosco's BP brand franchises outside California provided that the franchisees' rent shall remain the same throughout the lease term, whereas the new 76 brand franchises provide for yearly rent increases based on a formula tied to the consumer price index. Petitioners fail to point out that this provision, which they claim to be "discriminatory," was in their former Unocal agreements. It was merely carried through by Tosco in the replacement franchises as part of Tosco's efforts to have the new franchises mirror their former franchises, thereby minimizing any disruption from the change in franchisor.[3]

The district court and court of appeals did not deem it necessary to determine whether the PMPA requires any comparison to BP franchises in a different region because they correctly concluded that, even if such a comparison were required, the differences between the 76 and BP agreements would not amount to discrimination against the "76" franchisees. The Simmons petitioners fail to offer any evidence whatsoever that this one asserted difference between their 76 franchises and then-existing BP franchises was based on a discriminatory motive or that it was inserted in their leases as a pretext to disenfranchise them. Without a shred of evidence of any pretext or a discriminatory motive,

3. Indeed, the new 76 brand franchises offered to Appellants became the template for Tosco's existing franchises elsewhere, and Tosco's renewals of its BP leases in the Pacific northwest (and its Exxon franchises in Arizona) now also contain a rental increase provision.

they cannot establish their discrimination claim under the PMPA as a matter of law. All the more so here, when what Tosco decided to do was to offer its new franchisees precisely the terms they were accustomed to, rather than alter them. It is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of the 76 brand. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers*, 725 F. Supp. at 1109. That is especially true when, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

The court of appeals and district court correctly found that the franchisees did not demonstrate any lack of good faith in Tosco's offer of franchises to them, and that they cannot show that they have been treated in a discriminatory fashion.

E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing

The court of appeals did not err in concluding in its unpublished memorandum that the Simmons group had not suffered antitrust injury and lacked antitrust standing. The Simmons group fails to point to any split in the circuits on this issue. Indeed, they do not cite to any decision whatsoever holding that petroleum franchisees suffer a cognizable antitrust injury and have antitrust standing to sue in circumstances such as this. The Simmons petitioners suffered no antitrust injury and lacked standing to assert any such claims.

The Simmons group asserts that the transfer of the Union 76 franchise interests and premises to Tosco was an antitrust violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits combinations in restraint of trade, and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that may lessen competition. An antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). If relief is sought under Section 4, the plaintiff must demonstrate standing, which is tested by the application of a number of factors, which seek to assure, among other things, that the asserted damage is not a matter of mere speculation as far as the plaintiff is concerned, and that, even if there were some damage, the plaintiff is truly an appropriate person to assert it for antitrust purposes.

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 908, 74 L. Ed. 2d 723 (1983); *R. C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Section 16 is not quite as demanding, but it at least requires a showing that there is a significant threat impending. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969).

Petitioner's first claimed injury — loss of the right under the PMPA to purchase and own their currently leased stations — is related to the structure of the acquisition; specifically, whether it violated the PMPA.[4] This alleged injury is unrelated

4. Ironically, it is the fact of the acquisition that allegedly gives rise to Appellants' asserted rights under the PMPA and California statute to buy their leased stations. In other words, but for the (Cont'd)

to any purported decrease in competition resulting from the acquisition. For example, if Unocal had sold its assets under an identical deal to a new market entrant, thereby resulting in no increase of market share, Petitioners would still have lost the asserted right to purchase their own stations. This alleged injury is not proximately caused by any asserted anticompetitive effects of the asset purchase. Clearly, it does not reflect "the type of loss that the claimed violations . . . would be likely to cause," and does not give rise to antitrust standing. *Brunswick*, 9 U.S. at 489. Moreover, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit would thereby have been conferred upon the group members through individual offers of sale bu Union Oil to them.

The Simmons group argues that the court of appeals' opinion fails to address its other purported injury, namely, that the mere switch in franchisor might result in increased wholesale prices to them. (Simmons Pet. at 20). They are incorrect. The court of appeals specifically rejected that purported speculative injury. It stated, assuming the existence of additional market concentration for the sake of argument, that while "added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence, to suggest that these franchisees are threatened by their own franchisor."[5] (Simmons Pet. App. at 39). The Court added:

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allegedly anticompetitive acquisition, Appellants could not claim the alleged right to purchase. Therefore, the alleged anticompetitive acts of Unocal and Tosco simultaneously create and injure the same right. Appellants have alleged irreconcilably inconsistent positions.

5. Respondents note that the Tosco sale did not increase market concentration given that Tosco occupied less than one percent of the relevant market before the acquisition.

> We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation which does not disclose a significant threat. *See*, e.g. *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87, 590-91, 592-95 (3rd Cir. 1979).

The court of appeals correctly observed that, even if the franchisor were able to charge higher prices, the "franchisees are actually allies of their franchisor as all of them face the marketing efforts of others." *Id.*

Indeed, the franchisees cannot claim to be affected either by a decrease in competition between Tosco and Unocal or by any alleged general decrease in competition within the wholesale motor fuel market. Prior to the acquisition, there was no competition between Tosco and Unocal (or any other supplier) in the supply of motor fuel to Petitioners. They do not dispute that they were, and remain, "76" brand franchisees, bound by their former and current franchise agreements to purchase all of their motor fuel requirements directly from their franchisor — formerly Unocal and now Tosco. Quite simply, they do not participate and have never participated in a competitive market for the purchase of wholesale motor fuel. Petitioners cannot allege injury for price increases in a market in which they were not participants. *See Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997), *quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).

Thus, even assuming that at some point there is an increase in the price of the "76" brand wholesale motor fuel that petitioners are now obligated to purchase from Tosco, that increase would not be the result of a lessening in competition, because there is not and has never been any competition in the sale of "76" brand wholesale motor fuel to them. Therefore, the court of appeals correctly determined that the Simmons group's speculation about possible wholesale price increases cannot constitute a cognizable antitrust injury suffered by them.[6]

---

6. Accordingly, Petitioners' argument that they stand in the position of consumers or customers of the merged entity is without merit. They are branded franchisees who do not purchase their motor fuel on the wholesale open market, as might an independent dealer or a wholesale gasoline distributor. The Simmons group's citation to *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991) thus is inapposite. In *Nelson*, the plaintiffs were patients of a medical center that merged with the only other health care provider in plaintiffs' hometown of Monroe, Wisconsin — an entity which plaintiffs had previously sued. The merged entity then refused to treat them. The Seventh Circuit held that the defendant's decision not to treat them was a direct result of the exercise of its market power and that but for the merger and the resultant monopoly, the plaintiffs might still be enjoying medical care in Monroe. In contrast, these petitioners are not "consumers" directly harmed by any alleged elimination of competition. They are branded franchisees in the exact same position now as they were when Unocal was their franchisor. Similarly, there is nothing about the *California v. American Stores Company*, 495 U.S. 271 (1990), decision that suggests that the Simons petitioners possess antitrust standing.

CONCLUSION

The petitions for a writ of certiorari filed by the Simmons and Hindi petitioners should be denied.

Respectfully submitted,

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Nos. 99-446, 99-551

IN THE

Supreme Court of the United States

BASSAM HINDI, *et al.*,

Petitioners,

v.

TOSCO CORPORATION, *et al.*,

Respondents.

-and-

CHARLES SIMMONS, *et al.*,

Petitioners,

v.

UNOCAL CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY SIMMONS AND HINDI PETITIONS

1. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that Tosco's acquisition of Union Oil Company of California's ("Union Oil") west coast assets pursuant to Union Oil's withdrawal from the geographic market did not violate the timing and "discrimination" provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-6 ("PMPA").

2. As to the Petitions filed by the Simmons and Hindi groups, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the decision by Tosco Corporation to utilize synthetic leasing to finance a portion of the assets acquired from Union Oil did not contravene the PMPA.

3. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the Simmons group did not possess antitrust standing and had not suffered antitrust injury arising from Tosco's acquisition of Union Oil's west coast assets.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of Court, Respondents state as follows:

Tosco Corporation, T Northwest Properties II, Inc., and Clover Trust 1997-1, state that Tosco Corporation and Clover Trust 1997-1 do not have any parent corporations. T Northwest Properties II, Inc. is a wholly owned subsidiary of Tosco Corporation.

Union Oil is a wholly-owned subsidiary of Unocal Corporation.

There is no publicly held company that owns 10% or more of the stock of any Respondent.

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STATEMENT

1. Union Oil withdrew from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In doing so, Union Oil sold its marketing assets to Tosco. A number of former Union Oil franchisees objected to the sale on various grounds mostly arising out of the PMPA. In separate rulings, the district court ruled against all of them. Four groups of plaintiffs appealed to the Ninth Circuit Court of Appeals. Of the four groups, only two — the Hindi and Simmons groups — filed Petitions for a Writ of Certiorari. Respondents address both Petitions in this brief.

2. Unocal conducted its petroleum refining, transportation, and marketing business by and through its wholly owned subsidiary, Union Oil. In 1994, Union Oil established a separate unincorporated business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

3. For several years, Unocal gave consideration to various ways of restructuring 76 Products, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during the period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996, began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans

continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated, but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow as a stand alone business.

4. Discussions with Tosco continued, and by late October Tosco and Unocal were in active negotiations over a possible acquisition of 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996, and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval of Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The Management Committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

5. The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market

withdrawal" as defined under the PMPA by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obligated to offer each Union Oil franchisee a nondiscriminatory, three-year petroleum marketing franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination or nonrenewal of their franchises, effective June 30, 1997, and, as required under the PMPA, Union Oil also notified the Governors of the affected states of its market withdrawal.

6. By April 15, 1997, Tosco offered petroleum marketing franchises, which were to become effective July 1, 1997, to the Union Oil franchisees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees.

7. Tosco financed a portion of the acquisition through a secured financing vehicle known as synthetic leasing. None of the facts pertaining to Tosco's synthetic lease financing were disputed before the district court or the court of appeals. A synthetic lease is a financing arrangement first developed in the late 1980s and has become a commonly used means for publicly traded companies to finance asset acquisitions.

8. The synthetic lease is a form of financing structured to meet the Generally Accepted Accounting Principles ("GAAP") definition of an operating lease for accounting purposes, which gives the company off-balance sheet accounting treatment. At the same time, based on its attributes, the synthetic lease is viewed as a secured loan by the company for legal and tax purposes, since the company retains the risks and benefits of ownership of the assets being

financed. This financial structure is efficient because it provides low cost financing and is treated as an operating lease for book purposes. Therefore, neither the asset being financed nor the corresponding debt are reflected on the company's balance sheet, resulting in more competitive financial ratios, as is done by many of Tosco's competitors. (While the assets being financed and the corresponding liabilities do not appear in the financial statements, they are fully discussed in the Notes To Consolidated Financial Statements that are published with the financial statements.)

9. In the basic synthetic lease structure, a special purpose entity ("SPE") is formed to receive the loan from the lending institution, transmit the loan proceeds to the seller and acquire bare legal title to the properties. The SPE, here Respondent Clover Trust, is not an operating entity. The acquiring company or its subsidiary then enters into a short-term lease agreement with the SPE (with the SPE as lessor) with an option for the acquiring company to obtain title to the properties for a fixed price or pursuant to a fixed formula.

10. The acquiring company, here Tosco, assumes all operational and casualty risks of the properties and takes full responsibility for operating, maintaining and managing the assets. Because of these features, the lease appears and functions like a medium-term, revolving credit arrangement rather than a typical lease, with all the protections for the lessor in place that would apply in the case of a normal, medium-term, secured commercial loan to a company with a high credit rating.

11. Tax and bankruptcy authorities consider synthetic leases to be financing transactions, based primarily on factors such as the intent of the parties, the relatively small equity

investment by the SPE, the option to purchase the asset by the company at a later date, and the fact that all of the burdens, risks, rewards and responsibilities for the asset associated with ownership reside with the acquiring company (Tosco), which will enjoy any appreciation in the value of the property and bears the risk of asset depreciation. The Internal Revenue Service treats the transaction as a secured financing, viewing the company as the beneficial owner of the assets. The bankruptcy courts take the same approach, determining, based on the intent of the parties and the economic substance of the transaction, that the transaction should be treated as a financing arrangement.

12. Clover Trust was formed as the SPE to facilitate the "synthetic leasing" arrangement used by Tosco to finance a position of the purchase. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took legal title to the properties and then entered into a short-term lease with Tosco's subsidiary, Northwest. Clover Trust agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring legal title via a fixed formula at the end of the lease. If it does not acquire title at the end of the lease, Tosco must still pay 75 to 80 percent of the loan's value, making acquisition of title a foregone conclusion. Tosco and Clover Trust intended that the transaction be treated as a secured loan to Tosco for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes and burdens of ownership. Tosco has all responsibility to insure and maintain the properties,

must keep them free of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a specified price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with the environmental laws.

13. If the Clover Trust lease were to terminate before any franchise agreement terminated, an addendum sent to the franchisees stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

14. Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a small percentage of the California franchisees whom asserted a desire to purchase the premises on which they were operating.

15. The Simmons group filed a complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into

and renewing franchise agreements after it had decided to withdraw from the market, and by utilizing the synthetic lease financing. It also alleged that Tosco violated the PMPA because it purportedly failed to offer non-discriminatory franchises. The district court granted summary judgment against the group and it appealed to the Ninth Circuit.

16. The Hindi group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA by utilizing synthetic lease financing. The district court granted summary judgment against the group and it, too, appealed.

17. On May 19, 1999, the court of appeals affirmed the district court's grants of summary judgment in total. The court of appeals published an opinion addressing the PMPA issues, which were asserted by the four groups of plaintiffs. The court addressed the Simmons group's antitrust claims and a discovery issue raised by that group in an unpublished memorandum opinion.

18. As to the PMPA arguments, the court of appeals followed unanimous precedent in holding that Union Oil did not violate any timing requirements in connection with its withdrawal, as it did not determine to withdraw from the market until its Board of Directors approved a resolution authorizing Union Oil to enter into an agreement with Tosco. The court of appeals also found unpersuasive the contention that Tosco's decision to utilize synthetic leasing to finance a portion of the transaction violated section 2802(b)(2)(E)(iii)(II) ("subsection II") of the PMPA, stating

> [n]othing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements.

Finally, the court of appeals concluded that Tosco's franchise offers, which were identical as to all the Union Oil franchisees and essentially mirrored their former franchise agreements with Union Oil, were not discriminatory.

19. As to the Simmons group's antitrust claims, the court of appeals affirmed the district court's grant of summary judgment, holding that the appellants' claimed injuries — the alleged loss of the opportunity to buy the service stations they operate and the possibility of increased wholesale prices from their own franchisor — were unfounded, constituting "rank speculation".

20. The Simmons group filed a Petition with this Court, asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). The Simmons group further contends that the district court and court of appeals erred in concluding that petitioners did not suffer an antitrust injury and lacked antitrust standing.

21. The Hindi group filed a separate Petition asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the PMPA. Respondents address both Petitions in this consolidated brief.

ARGUMENT

The court of appeals correctly held that that Union Oil and Tosco properly adhered to the provisions of the PMPA with respect to: (1) the timing of the transaction; (2) the synthetic leasing financing mechanism chosen by Tosco; and (3) the offer of non-discriminatory franchises. The court's decision does not conflict with any decision of this Court or any decision rendered by the other circuits. Similarly, the court's ruling that the Simmons group did not suffer antitrust injury and lacked antitrust standing is fully consistent with the decisions of this Court and the other circuits. The Simmons Petition fails to cite any circuit decision or decision by this Court granting standing to franchisees in the context of a sale which, to the franchisees, merely has the effect of replacing one franchisor with another. None of these determinations warrants further review.

A. The PMPA Balances The Interests Of Franchisors and Franchisees

The PMPA was designed to offer additional protection to petroleum products franchisees from arbitrary or discriminatory termination of their franchise agreements or non-renewal of the franchise relationship. S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was "[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance

of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf, Inc. v. Chevron USA, Inc.*, 869 F.2d 917, 919, 921 (6th Cir. 1989). " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

In the context of a market withdrawal, the statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if —
>
> (i) such determination —
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and

(iii) in the case of leased marketing premises —

. . .

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E).

Respondents turn to the specific issues in this case.

B. The Timing of the Withdrawal Did Not Violate the PMPA

The Simmons group argues that Union Oil violated the PMPA because it engaged in preliminary discussions about possible withdrawal options before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). Following unanimous

precedent, the court of appeals correctly found this argument unpersuasive. The Simmons petitioners cite no case supporting their position.

In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(I), Union Oil's actual decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed. The latest franchise renewal was October 1, 1996. The district court and court of appeals both ruled that the withdrawal determination was made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I).

In so ruling, the lower courts followed unanimous precedent. Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som*, 869 F.2d 917, 919, 927 (6th Cir. 1989) (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.*, 933 F. Supp. 52, 59 (D.D.C. 1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the court of appeals noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts

had preceded the eventual deal with Tosco, and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that date was the sale to Tosco negotiated and a decision to withdraw reached. Therefore, 15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf,* 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

The Simmons Petition fails to cite any decision that has held to the contrary. No further review is warranted.

C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA

Petitioners also claim a violation of the PMPA because Tosco chose to utilize synthetic leasing as a means to finance its acquisition of a portion of the assets. The district court and court of appeals correctly determined that the PMPA does not prohibit financing techniques such as synthetic leasing, and that the franchisees were fully protected in the manner intended by the PMPA through the offer of new, non-discriminatory franchise agreements by Tosco that enabled the franchisees to continue operating their businesses in exactly the same manner as they had been doing before.

Petitioners do not point to any decision by this Court, or any decision by other circuit courts, holding synthetic leasing to be violative of the PMPA. Indeed, petitioners fail to cite any decision that has considered this truly arcane financing issue in the context of the PMPA. No further review is warranted.

When a franchisor terminates or nonrenews existing franchises or franchise relationships as part of a market withdrawal, section 2802(b)(2)(E)(iii) provides that the franchisor can either: (I) grant the franchisee a chance to match a bona fide offer to purchase the premises; or (II) sell, assign, or transfer the franchisor's interest to another person who will offer a non-discriminatory franchise to the franchisee.

Subsections (I) and (II) apply in different situations. Subsection (I) by its plain language contemplates a situation in which the withdrawing franchisor does *not* seek to sell the particular franchise as part of a transfer of its interest in multiple service stations to a new franchisor. *See, e.g., Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 15 at n.7 (1st Cir. 1986) ("Because Shell's purchase offer included some 400 Arco franchises, as well as numerous other assets, Subsection (E)(iii)(II) — requiring only that the purchasing franchisor offer the dealer a nondiscriminatory franchise — applied, rather than Subsection (E)(iii)(I) whose 'right of first refusal' provision contemplates the sale of a single franchise."). Recognizing that the franchisee should have greater rights in the service station property than a random buyer of the premises, the PMPA requires a franchisor who proceeds under this section to provide the franchisee the opportunity to purchase the premises so that the franchisee may continue its business in that location.

By contrast, Subsection (II) contemplates the situation when, as here, the withdrawing franchisor seeks to sell its interests in multiple service stations as a going concern to another franchisor. *See, e.g., Avramidis*, 798 F.2d at 15 n.7. Subsection (II) protects the franchisees from arbitrary or unfair treatment by the new franchisor by guaranteeing that the dealers will receive replacement franchises on fair terms, and thus can continue to remain in business at that location, as franchisees of the new franchisor. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992).

The Petitioners argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of legal title to the premises under the secured financing, is not a franchisor capable of offering nondiscriminatory franchises to the former Union Oil franchisees. The court of appeals correctly observed that this argument "is far too simplistic." That Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales, is legally irrelevant. The synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II, because Clover Trust is part of a special purpose financial arrangement whereby Tosco purchased the property, and Tosco was indeed capable of offering — and did offer — non-discriminatory franchises to the former Union Oil franchisees.

Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom

the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. The use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf*, 869 F.2d at 921; *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of the Union 76 brand, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises.

The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises is absolute and real. Indeed, general law treats synthetic lease arrangements as transparent for tax and other legal purposes. The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by all concerned, including the government, as a secured loan.[1]

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1. *See, e.g., Sun Oil Company v. Commissioner of Internal Revenue*, 562 F.2d 258 (3d Cir. 1977); Revenue Procedures 75-21, 75-28, 76-30; *Moreggia & Sons, Inc. v. Walsh*, 852 F.2d 1179 (9th Cir. 1988) (the test is the intent of the parties and the economic

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The contention by the Hindi petitioners that the court of appeals' opinion contradicts other circuit decisions is meritless. (Hindi Pet. at 15) None of the three cases cited by petitioners involved synthetic leasing or any other issue involving financing. *See Avramidis*, 798 F.2d 12 (1st Cir. 1986); *John & Kostas Service Station Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991); and *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987). The *Avramidis* matter involved issues relating to PMPA notice and discrimination; the *Kostas* matter involved whether the new franchisor offered discriminatory franchises; and the *Ewing* case also involved issues of discrimination by the new franchisor. Nothing about those cases even remotely suggests that the decision by the new franchisor to utilize synthetic leasing violates the PMPA.

The court of appeals correctly observed that the result of the individual arrangements was a single transaction whereby Tosco took over the ownership and franchise role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, as the court of appeals stated, "there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens."

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substance of the arrangement, not the locus of title). *See also In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986) (holding that the lease in a sale-leaseback financing transaction was not a "lease" for purposes of section 365, looking at the economic realities of the transaction); *In re Independence Village*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (the lease-purchase contract was determined, in substance, to be a security agreement giving the lessor an equitable mortgage in the real property; court based conclusion on its analysis of the intentions of the parties and the economic substance of the transaction).

Moreover, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. It is a foregone conclusion Tosco will acquire legal title at the end of the synthetic lease term because the effective financial penalties would be very steep.

The franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 brand motor fuel had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship for which they bargained. The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. The court of appeals did not err in concluding that Subsection II was not violated by its use.

D. Tosco's Franchise Offers Were Not Discriminatory

The Simmons group asserts that the court of appeals erred in holding that Tosco's offers of new franchises were not discriminatory. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The court of appeals did not err, and its ruling was consistent with the unanimous precedent. Indeed, Petitioners do not point to any decision holding to the contrary. No further review is warranted.

Under the PMPA, a franchisor may sell its franchise to another franchisor so long as the new franchisor "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person **or** franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). (Emphasis supplied) Each location has a unique set of considerations based, for example, on its particular competitive situation or the contract terms already in place for existing, similarly situated franchisees. By phrasing subsection (E)(iii)(II) in the disjunctive, Congress understood the importance of providing the franchisor with the business flexibility to provide a new franchisee with the offer of a franchise that is comparable either to the other new franchises being offered *or* to existing franchises that may be more relevantly situated.[2]

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2. For example, if the franchisor acquires additional franchises in the context of a market withdrawal, it may make business sense to offer leases to some of the new franchisees on terms that differ from each other but that mirror existing franchises in similar relevant circumstances (i.e., all service stations in XXXX County might be full-serve and operate 24 hours, which is expected by the residents

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The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at different franchise locations." *Ewing*, 823 F.2d at 1438. "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989); *see also Avramidis*, 798 F.2d at 13-14.

The "good faith" requirement looks to whether the franchisor's actions are intended to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers*, 725 F. Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id., citing Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 772 (E.D. Pa. 1983). In the context of grounds for nonrenewal under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in

> judicial second-guessing of "the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory *motive* or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith."

Valentine, 789 F.2d at 1392 (emphasis supplied).

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and necessary in order to be competitive). On the other hand, for legitimate business reasons, the franchisor may want to provide all of the new franchisees with agreements materially similar to each other but that differ in some respects from existing leases which may not be relevantly situated or which may contain outdated terms that will be revised upon expiration of the existing franchises.

The Simmons group does not dispute that the franchise agreements offered by Tosco were essentially the same for each of the former Union Oil franchisees or that they mirrored those which the franchisees had with Union Oil. Their sole argument that they were offered "discriminatory" franchises is that Tosco's BP brand franchises outside California provided that the franchisees' rent shall remain the same throughout the lease term, whereas the new 76 brand franchises provide for yearly rent increases based on a formula tied to the consumer price index. Petitioners fail to point out that this provision, which they claim to be "discriminatory," was in their former Unocal agreements. It was merely carried through by Tosco in the replacement franchises as part of Tosco's efforts to have the new franchises mirror their former franchises, thereby minimizing any disruption from the change in franchisor.[3]

The district court and court of appeals did not deem it necessary to determine whether the PMPA requires any comparison to BP franchises in a different region because they correctly concluded that, even if such a comparison were required, the differences between the 76 and BP agreements would not amount to discrimination against the "76" franchisees. The Simmons petitioners fail to offer any evidence whatsoever that this one asserted difference between their 76 franchises and then-existing BP franchises was based on a discriminatory motive or that it was inserted in their leases as a pretext to disenfranchise them. Without a shred of evidence of any pretext or a discriminatory motive,

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3. Indeed, the new 76 brand franchises offered to Appellants became the template for Tosco's existing franchises elsewhere, and Tosco's renewals of its BP leases in the Pacific northwest (and its Exxon franchises in Arizona) now also contain a rental increase provision.

they cannot establish their discrimination claim under the PMPA as a matter of law. All the more so here, when what Tosco decided to do was to offer its new franchisees precisely the terms they were accustomed to, rather than alter them. It is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of the 76 brand. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers*, 725 F. Supp. at 1109. That is especially true when, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

The court of appeals and district court correctly found that the franchisees did not demonstrate any lack of good faith in Tosco's offer of franchises to them, and that they cannot show that they have been treated in a discriminatory fashion.

E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing

The court of appeals did not err in concluding in its unpublished memorandum that the Simmons group had not suffered antitrust injury and lacked antitrust standing. The Simmons group fails to point to any split in the circuits on this issue. Indeed, they do not cite to any decision whatsoever holding that petroleum franchisees suffer a cognizable antitrust injury and have antitrust standing to sue in circumstances such as this. The Simmons petitioners suffered no antitrust injury and lacked standing to assert any such claims.

The Simmons group asserts that the transfer of the Union 76 franchise interests and premises to Tosco was an antitrust violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits combinations in restraint of trade, and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that may lessen competition. An antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). If relief is sought under Section 4, the plaintiff must demonstrate standing, which is tested by the application of a number of factors, which seek to assure, among other things, that the asserted damage is not a matter of mere speculation as far as the plaintiff is concerned, and that, even if there were some damage, the plaintiff is truly an appropriate person to assert it for antitrust purposes.

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 908, 74 L. Ed. 2d 723 (1983); *R. C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Section 16 is not quite as demanding, but it at least requires a showing that there is a significant threat impending. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969).

Petitioner's first claimed injury — loss of the right under the PMPA to purchase and own their currently leased stations — is related to the structure of the acquisition; specifically, whether it violated the PMPA.[4] This alleged injury is unrelated

4. Ironically, it is the fact of the acquisition that allegedly gives rise to Appellants' asserted rights under the PMPA and California statute to buy their leased stations. In other words, but for the (Cont'd)

to any purported decrease in competition resulting from the acquisition. For example, if Unocal had sold its assets under an identical deal to a new market entrant, thereby resulting in no increase of market share, Petitioners would still have lost the asserted right to purchase their own stations. This alleged injury is not proximately caused by any asserted anticompetitive effects of the asset purchase. Clearly, it does not reflect "the type of loss that the claimed violations . . . would be likely to cause," and does not give rise to antitrust standing. *Brunswick*, 9 U.S. at 489. Moreover, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit would thereby have been conferred upon the group members through individual offers of sale bu Union Oil to them.

The Simmons group argues that the court of appeals' opinion fails to address its other purported injury, namely, that the mere switch in franchisor might result in increased wholesale prices to them. (Simmons Pet. at 20). They are incorrect. The court of appeals specifically rejected that purported speculative injury. It stated, assuming the existence of additional market concentration for the sake of argument, that while "added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence, to suggest that these franchisees are threatened by their own franchisor."[5] (Simmons Pet. App. at 39). The Court added:

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allegedly anticompetitive acquisition, Appellants could not claim the alleged right to purchase. Therefore, the alleged anticompetitive acts of Unocal and Tosco simultaneously create and injure the same right. Appellants have alleged irreconcilably inconsistent positions.

5. Respondents note that the Tosco sale did not increase market concentration given that Tosco occupied less than one percent of the relevant market before the acquisition.

> We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation which does not disclose a significant threat. *See*, e.g. *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87, 590-91, 592-95 (3rd Cir. 1979).

The court of appeals correctly observed that, even if the franchisor were able to charge higher prices, the "franchisees are actually allies of their franchisor as all of them face the marketing efforts of others." *Id.*

Indeed, the franchisees cannot claim to be affected either by a decrease in competition between Tosco and Unocal or by any alleged general decrease in competition within the wholesale motor fuel market. Prior to the acquisition, there was no competition between Tosco and Unocal (or any other supplier) in the supply of motor fuel to Petitioners. They do not dispute that they were, and remain, "76" brand franchisees, bound by their former and current franchise agreements to purchase all of their motor fuel requirements directly from their franchisor — formerly Unocal and now Tosco. Quite simply, they do not participate and have never participated in a competitive market for the purchase of wholesale motor fuel. Petitioners cannot allege injury for price increases in a market in which they were not participants. *See Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997), *quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).

Thus, even assuming that at some point there is an increase in the price of the "76" brand wholesale motor fuel that petitioners are now obligated to purchase from Tosco, that increase would not be the result of a lessening in competition, because there is not and has never been any competition in the sale of "76" brand wholesale motor fuel to them. Therefore, the court of appeals correctly determined that the Simmons group's speculation about possible wholesale price increases cannot constitute a cognizable antitrust injury suffered by them.[6]

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6. Accordingly, Petitioners' argument that they stand in the position of consumers or customers of the merged entity is without merit. They are branded franchisees who do not purchase their motor fuel on the wholesale open market, as might an independent dealer or a wholesale gasoline distributor. The Simmons group's citation to *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991) thus is inapposite. In *Nelson*, the plaintiffs were patients of a medical center that merged with the only other health care provider in plaintiffs' hometown of Monroe, Wisconsin — an entity which plaintiffs had previously sued. The merged entity then refused to treat them. The Seventh Circuit held that the defendant's decision not to treat them was a direct result of the exercise of its market power and that but for the merger and the resultant monopoly, the plaintiffs might still be enjoying medical care in Monroe. In contrast, these petitioners are not "consumers" directly harmed by any alleged elimination of competition. They are branded franchisees in the exact same position now as they were when Unocal was their franchisor. Similarly, there is nothing about the *California v. American Stores Company*, 495 U.S. 271 (1990), decision that suggests that the Simons petitioners possess antitrust standing.

CONCLUSION

The petitions for a writ of certiorari filed by the Simmons and Hindi petitioners should be denied.

Respectfully submitted,

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